86 1694

Supreme Court, U.S.
FILED
APR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1986

ROBERT T. SAVELY, ET AL.,
Petitioners,

vs.

CITY OF HOUSTON, TEXAS, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the First Supreme Judicial District of Texas

W. B. BROWDER, JR.
STUBBEMAN, McRAE, SEALY,
LAUGHLIN & BROWDER
800 Two First City Center
P. O. Box 1540
Midland, Texas 79702-1540
(915) 682-1616
COUNSEL OF RECORD FOR PETITIONERS

D. DOUGLAS BROTHERS
GILLIS REAVIS
BROTHERS, REAVIS
& McGINNIS
1220 Colorado, Suite 200
Austin, Texas 78701
(512) 476-0237
OF COUNSEL TO PETITIONERS

WILLIAM E. SCHWEINLE, JR.
STUBBEMAN, McRAE, SEALY
LAUGHLIN & BROWDER
2400 RepublicBank Center
P. O. Box 61149
Houston, Texas 77208
(713) 237-1100
OF COUNSEL TO PETITIONERS

April 20, 1987

QUESTION PRESENTED

1. Do the First Amendment and Equal Protection Clause of the Fourteenth Amendment prohibit a city council from imposing the following content-based restrictions on those who speak or who attempt to speak before the council:

a) Arbitrarily limiting the number of speakers at a public hearing; or

b) Calling persons to speak in an undisclosed order such that many interested persons were not present when called?

LIST OF PARTIES

The parties to the proceedings below were, as plaintiffs, Robert T. Savely, Clear Lake City Water Authority, David T. Riley, William C. Farries, Jocelyn H. Otto, Albert L. Lapidus, M. S. Swerdlin, James C. Allison, Susan R. Allison, J. R. Garman, James K. Atkinson, Karen Atkinson and Judy Lane.

In addition, the State of Texas, by and through Harris County Attorney Mike Driscoll, intervened as a party-plaintiff.

Defendants below were the City of Houston, Kathy Whitmire, Jim McConn, Fred Hofheinz, Anna Russell, Henry Kriegel, Guy Griscom, Judson Robinson, Jr., Larry McKaskle, Louis Macey, Frank D. Mancuso, Jim Westmoreland, Frank E. Mann, Johnny Goyen, George Greanias, Jim Greenwood, Eleanor Tinsley, Christin Hartung, Ben Reyes, Dale Gorczynski, John Goodner, Rodney Ellis, Anthony Hall and Ernest McGowen.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	10
APPENDIX	A1

TABLE OF AUTHORITIES

Cases	Page
United States Supreme Court	
City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976)	8,9
New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	5
Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983)	8
Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972)	8
Secretary of State of Maryland v. Joseph H. Munson Co., Inc. 467 U.S. 947 (1984)	10
Staub v. City of Baxley, 355 U.S. 313 (1958)	10
Street v. New York, 394 U.S. 576 (1969)	5
Vachon v. New Hampshire, 414 U.S. 478 (1974)	5
Webb v. Webb, 451 U.S. 493 (1981)	5
Wood v. Georgia, 450 U.S. 261 (1981)	5
United States Court of Appeals	
Henrico Professional Firefighters Assn. v. Board of Supervisors of Henrico County, 649 F.2d 237 (4th Cir. 1981)	9
Hickory Firefighters Assn. v. City of Hickory, 656 F.2d 917 (4th Cir. 1981)	9,10
Local 2106, Int. Assn. of Firefighters v. City of Rock Hill, 660 F.2d 97 (4th Cir. 1981)	9
United States Constitution	
Amendment I	2
Amendment XIV	2
Statutes	
28 United States Code Section 1257(3)	2
Texas Revised Civil Statutes Annotated, article 970a	3,6

IN THE

Supreme Court of the United States

October Term, 1986

ROBERT T. SAVELY, ET AL.,

Petitioners,

vs.

CITY OF HOUSTON, TEXAS, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the First Supreme Judicial District of Texas

---

The Petitioners, Robert T. Savely, *et al.* (collectively "Savely"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the First Supreme Judicial District of Texas entered in this proceeding on February 13, 1986.

OPINIONS BELOW

The Supreme Court of Texas refused to grant Savely's Writ of Error and, therefore, issued no opinion in this case. That court refused the writ, pursuant to Texas Rule of Appellate Procedure 133, with the notation "Refused. No Reversible Error." 30 Tex.S.Ct.J. 108 (December 20, 1986).

The opinion of the Court of Appeals for the First Supreme Judicial District of Texas (hereafter referred to as the "First Court of Appeals") is reported at 708 S.W.2d 879, and is reprinted in the appendix hereto, p.A1, *infra*.

The judgment of the Harris County District Court, 11th Judicial District (Blanton, J.), has not been reported. It is reprinted in the appendix hereto, p.A15, *infra*.

JURISDICTION

This case was brought in the District Court of Harris County, Texas. Judgment was rendered in favor of Savely. The City of Houston, Texas, *et al.* (collectively "Houston") appealed to the First Court of Appeals. On February 13, 1986, the court of appeals reversed the judgment of the district court and rendered judgment in favor of Houston. Savely filed a motion for rehearing in the court of appeals. The motion was overruled on April 17, 1986.

On May 16, 1986, Savely filed an application for writ of error seeking review by the Supreme Court of Texas. On December 17, 1986, that court refused Savely's application. Savely timely filed a motion for rehearing with the Texas Supreme Court and the motion was overruled on January 21, 1987.

The jurisdiction of this Court to review the judgment of the Supreme Court of Texas is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1977, the City of Houston, Texas purported to enact two annexation ordinances encompassing the unincorporated portion of

southeast Harris County known as Clear Lake City. The area annexed includes some 8,500 acres and has in excess of 30,000 residents.

Annexation proceedings in Texas are governed by the Municipal Annexation Act, article 970a of the Texas Revised Civil Statutes Annotated. Section six of the Act requires that a public hearing be held which shall provide "an opportunity for all interested persons to be heard."

The Clear Lake annexation proceedings began when Houston posted an emergency notice of intent to institute annexation proceedings on Friday, July 22, 1977 at 6:05 p.m. The following Tuesday, a hearing was held during which only a small percentage of those wishing to speak were heard. An annexation ordinance subsequently passed on three readings. This first annexation (Houston Ordinance No. 77-1423) is referred to as the Strip Annexation.

The area described in the Strip Annexation formed a pretzel-like strip. The strip was designed to include the unpopulated portions of the Clear Lake City area such as roadways, creeks and the like. The unannexed areas in the middle of the pretzel were populated residential subdivisions.

Houston began the annexation proceedings in fear that the citizens of Clear Lake City would incorporate their own municipality. The Strip Annexation was designed to preclude incorporation under applicable state law by fragmenting the population of the area. The annexation also precluded residents from voting in the Houston elections in November of 1977.

When the Strip Annexation efforts were completed, Houston proceeded at a more leisurely pace to annex the entire Clear Lake City area (including the "holes in the pretzel"). This second annexation is known as the Block Annexation (Houston Ordinance No. 77-1668). Public hearings relative to the Block Annexation were held on August 9, 10, and 12. All persons wishing to speak were not heard.

Each of the hearings was designed and conducted to deny a fair hearing to those opposed to the Clear Lake annexations.

This litigation was filed by residents of the Clear Lake City area in July of 1977. The State of Texas subsequently intervened on their behalf. In Count 4 of the trial pleading, the federal constitutional claim was raised in the following terms:

> Defendants denied to Plaintiffs and others an opportunity to speak, assemble, or petition their government. Such denial by Defendants infringed the First Amendment rights of Plaintiffs in that local officials discriminatorily exercised their discretion and prohibited Plaintiffs and other residents of Clear Lake City from having an equal opportunity to express their views as were customarily afforded to other persons and other groups in violation of U. S. Const. amend. I and Tex. Const. article 1, section 8.

The case was submitted to a jury on November 26, 1984. The jury charge specifically asked whether ". . . all plaintiffs wishing to be heard before the Houston City Council . . . were not given the opportunity to be heard." The jury answered, with respect to each of the annexation ordinances (Special Issues 3 and 4), that "All plaintiffs were not heard." *See* appendix hereto at p.A19, *infra.*

Following trial, the trial court entered judgment declaring both the Strip and Block Annexations void and permanently enjoining Houston from levying or collecting taxes or providing municipal services in the Clear Lake City area. Houston appealed to the First Court of Appeals. Savely was appellee before the court of appeals and, therefore, did not seek reversal of the trial court judgment but instead replied to arguments made by Houston. Houston's arguments attacked the legal and factual sufficiency of the evidence to support the jury's answers to Special Issues 3 and 4, the issues relating to denial of the opportunity to be heard. The bulk of Savely's response was directed toward rebutting Houston's arguments, but Savely clearly stated the federal constitutional claim by stating in the brief to the court of appeals:

> There is no authority for the notion that government can regulate the content of speech by closing the doors on a public hearing once the government deems itself to be "fully apprised" of objections to its actions.

In addition, Savely's brief contended that "the hearing was conducted in a manner so as to frustrate the opportunity to speak," and detailed the evidence supporting the jury findings challenged in the court of appeals.

On February 13, 1986, the court of appeals reversed the judgment of the trial court and rendered judgment declaring the annexation

valid and dissolving the injunction issued by the trial court. Savely filed a motion for rehearing in the court of appeals challenging the judgment of that court because it disregarded the jury's findings relating to the opportunity to be heard. *See* appendix hereto, p.A21, *infra.*

Savely filed an application for writ of error seeking review of the court of appeals' decision by the Texas Supreme Court. Savely presented 9 points of error relating to the denial of the opportunity to be heard. *See* appendix hereto, p.A24, *infra.* Savely did not cite specifically any provision of the United States Constitution, but instead grouped related points under the heading "All Interested Persons Were Not Afforded an Opportunity to Be Heard." In addition, Savely asked the Texas Supreme Court to reverse the court of appeals because the lower court erred in finding that the city council did not stifle opposition to its annexation. *See* appendix hereto, p.A25, *infra.* As this court stated in *New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928):

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

Savely's constitutional arguments were fairly brought to the attention of the Texas courts. *See Street v. New York*, 394 U.S. 576 (1969). They were rejected by the appellate courts.

On December 17, 1986, the Texas Supreme Court refused to grant Savely's writ of error and on January 21, 1987, that court denied Savely's motion for rehearing.

The rulings of those courts constitute plain error and this Court may review those rulings to prevent fundamental unfairness. *Webb v. Webb*, 451 U.S. 493, 502 (1981) (Powell, J., concurring); *Wood v. Georgia*, 450 U.S. 261, 264-65 (1981); *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

Savely requests that this Court reverse the judgment of the court

of appeals and affirm the judgment and order of permanent injunction of the trial court.

REASONS FOR GRANTING THE WRIT

The First Amendment and Equal Protection Clause of the Fourteenth Amendment prohibit municipal governments from creating a public forum and thereafter refusing to anyone the opportunity to be heard in that forum based on the content of speech. Because Houston engaged in precisely this type of selectivity before and during a series of annexation hearings, Houston violated the constitutional rights of Petitioners. The First Court of Appeals erred in reversing the trial court's judgment invalidating the annexations resulting from Houston's unconstitutional actions.

In July of 1977, Houston began the annexation process prescribed by the Municipal Annexation Act, *supra*. On July 25, 1977, a public hearing was held at which all interested persons were to have been afforded an opportunity to be heard.

By the time of the first public hearing, on July 26, 1977, Houston had clearly demonstrated that it was partisan with respect to the proposed ordinances. Prior to the hearing, a committee of council members had unanimously approved the first annexation ordinance and recommended its passage. This fact alone casts doubt on the fairness of the hearing because it was obvious that the outcome had already been determined. The hearings themselves were mandated by the Municipal Annexation Act. The refusal to hear all interested persons was content-based as was the refusal to hear any speakers prior to committee approval. As Houston Councilman Judson Robinson conceded at trial:

Q: And without a hearing before the committee meeting, people would be deprived of a fair hearing. Right?

A: I think so.

The city secretary's office told one of the plaintiffs that she would be afforded the opportunity to speak. When she appeared at the hearing, she was put on the list of speakers, but was never called to speak. Had she been given the opportunity, she would have spoken.

The hearings were repeatedly interrupted, recessed, and reconvened

with little or no notice to the speakers. *See* appendix hereto at p.A27, *infra.*

The very nature of the two-step Strip and Block annexations, in addition, indicates a desire to frustrate public opposition. As previously mentioned, the purpose of the two-step annexation process was to disenfranchise residents of the Clear Lake area and preclude their own incorporation.

It is equally clear that those wishing to speak before council opposed the action which Houston was about to take. The court of appeals noted, "All of the speakers were opposed to the annexation." *See* appendix hereto at p.A2, *infra.*. Houston's records indicate that two of the speakers were in favor of the annexation, and those two were called to speak early in the hearings.

The jury found that some persons wishing to speak were denied that opportunity. *See* appendix hereto at p.A19, *infra.*

Two of the individual petitioners testified that they were not permitted to speak. Council records reflect, in addition, that 107 persons who had signed up to speak were not present when called. This may be presumed to be a result of repeated interruptions in the hearings and lack of notice to speakers. *See* appendix hereto at p.A32, *infra.*

At the July 26 hearing — the sole hearing on the Strip Annexation — only 46 of 341 of those who signed up to speak were called.

For the August hearings, an arbitrary sign-up deadline of 5:00 p.m. August 8 was imposed. A list of speakers was prepared from those who contacted the city secretary's office. The speakers were called in order, but the order was not publicly revealed. Therefore, it was necessary to be present during all three days of hearings to ensure being present when called.

One of the plaintiffs, Jocelyn Otto, called the city secretary's office and was told she would be given an opportunity to speak. She appeared at the hearing, but was never called.

Houston refused or neglected to hear all interested persons because the content of the speech was unfavorable to Houston's predetermined course of action. The means in which the hearings were conducted was designed to restrict speech as a result of its content. Neither of these actions is permissible.

Under First Amendment forum analysis, the public hearings were limited public fora. The meetings were specifically opened for public discussion, and were required by the Municipal Annexation Act. Both of these facts create a limited public forum under this Court's decisions. *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 174 (1976) (hereafter referred to as *City of Madison v. WERC*).

Once a limited public forum is created, the government is bound by the same standards that apply in traditional public fora. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). The government may not enforce a content-based exclusion unless it is narrowly drawn to serve a compelling state interest. *Id.* Time, place and manner restrictions must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. *Id.* The exclusions by Houston fail to meet these standards and, therefore, violated Petitioners' First Amendment and Equal Protection Rights.

The Constitution of the United States prohibits censorship by government based on the content of speech. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. This prohibition applies with equal force when the government has, as in the present case, created the forum. As Justice Marshall stated for the majority in *Police Dept. of Chicago v. Mosley*:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they have to say.

408 U.S. at 96 (footnote omitted).

The jury in this case specifically found that Houston failed to afford all interested persons an opportunity to be heard, and the record

contains evidence making it abundantly clear that the reason for refusing the opportunity to speak was the fact that the speech would be unfavorable to Houston's position. Such a content-based exclusion is patently unconstitutional.

This Court has held that a school board, in conducting a public hearing, may not prevent individual teachers from expressing their views on issues of importance to the board and to the public. *City of Madison v. WERC*, 429 U.S. 167 (1976). As the court stated:

> [T]he participation in public discussion of public business cannot be confined to one category of individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.

Id. at 175-76. Similarly, Houston may not, consistent with the Constitution, prevent individual citizens, residents of the territory to be annexed, from presenting their views at a public hearing because those views were against annexation.

The action taken by Houston at the hearings must be invalidated. There is no other remedy for the violation of the speaker's constitutional rights. Houston, as well as other governmental entities, must be deterred from engaging in such conduct in the future. The Texas courts, therefore, erred in upholding the annexation by Houston.

The Fourth Circuit, in a series of opinions, has held that a city council may not constitutionally hold a public hearing and then prohibit certain persons from presenting their views on the subject of discussion at the meeting. *Local 2106, Int. Assn. of Firefighters v. City of Rock Hill*, 660 F.2d 97 (4th Cir. 1981); *Hickory Firefighters Assn. v. City of Hickory*, 656 F.2d 917 (4th Cir. 1981); *Henrico Professional Firefighters Assn. v. Board of Supervisors of Henrico County*, 649 F.2d 237 (4th Cir. 1981). As the court stated in *Hickory*:

> The public forum concept does not require that city council meetings always be open. In order to conduct its business, the council may impose reasonable time, place and manner restrictions on speech. What it cannot do, however, is open a meeting to the public and then prohibit the Association's speech simply because of what the Association is or what its representatives wish to say.

Hickory Firefighters Assn. v. City of Hickory , 656 F.2d at 922.

Houston prevented certain annexation opponents from speaking at a public forum. There was no compelling state interest being served. Houston simply wanted to limit discussion of contrary views, and its actions violated the constitutional rights of those holding contrary views.

Exclusion of the speakers at the annexation hearing may not be justified as a reasonable time, place and manner restriction. As the Court stated in *Perry*, in order to pass constitutional muster, a time, place and manner restriction must be content-neutral. 460 U.S. at 45. Houston's exclusion was based on content and, therefore, was unconstitutional. Moreover, this Court has invalidated licensing schemes that restrict speech because those schemes placed unguided discretion in the hands of an official and were, therefore, not narrowly drawn to serve the government's claimed interest. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Staub v. City of Baxley*, 355 U.S. 313 (1958). Houston officials made an entirely discretionary decision to prevent additional speakers at the Strip annexation hearings. No statute, ordinance or regulation regulated that discretion. As the Court stated in *Staub v. City of Baxley*:

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

355 U.S. at 322. Therefore, the unguided discretionary decision by Houston's officials to prevent or hinder further discussion cannot be justified as a reasonable time, place and manner restriction.

CONCLUSION

Cities such as Houston, Texas should not be permitted to stifle opposition to their actions by denying citizens the right to present opposing views at public hearings. This Petition for Certiorari should be granted to affirm the public's right to speak at public fora. The only remedy in this case is to invalidate the action taken by Houston in violation of the Constitution. Therefore, the judgment of the Court

of Appeals for the First Supreme Judicial District should be reversed and the judgment of the trial court be affirmed.

Respectfully submitted,

W. B. BROWDER, JR.
STUBBEMAN, McRAE, SEALY,
LAUGHLIN & BROWDER
800 Two First City Center
P. O. Box 1540
Midland, Texas 79702-1540
(915) 682-1616
COUNSEL OF RECORD FOR PETITIONERS

WILLIAM E. SCHWEINLE, JR.
STUBBEMAN, McRAE, SEALY
LAUGHLIN & BROWDER
2400 RepublicBank Center
P. O. Box 61149
Houston, Texas 77208
(713) 237-1100
OF COUNSEL TO PETITIONERS

D. DOUGLAS BROTHERS
GILLIS REAVIS
BROTHERS, REAVIS
& McGINNIS
1220 Colorado, Suite 200
Austin, Texas 78701
(512) 476-0237
OF COUNSEL TO PETITIONERS

APPENDIX
[COURT OF APPEALS OPINION]

CITY OF HOUSTON, TEXAS, ET AL.,
Appellants,

vs.

ROBERT T. SAVELY, ET AL.,
Appellees.

No. 01-85-0178-CV

Court of Appeals of Texas,
Houston (1st Dist).

Feb. 13, 1986.

Rehearing Denied April 17, 1986

Before COLEMAN, C.J. (Retired), and DUGGAN and HOYT, JJ.

OPINION

COLEMAN, Chief Justice (Retired).

This is an appeal from a judgment that held two City of Houston annexation ordinances void. These ordinances numbers 77-1423 ("the strip annexation") and 77- 1668 ("the block annexation") purported to annex the unincorporated area known as Clear Lake City. The plaintiffs, Clear Lake City Water Authority and 12 private citizens, sued the City of Houston and various present and former officials of the city ("Houston" or "the city") seeking to have the annexation ordinances declared void by reason of alleged violations of the Municipal Annexation Act, Tex. Rev. Civ. Stat. Ann. art. 970a (Vernon 1963 & Supp. 1986). The State of Texas through the County Attorney intervened on the side of the plaintiffs by filing an Information in the Nature of Quo Warranto attacking only the strip annexation ordinance.

After a trial to a jury, judgment was rendered declaring each of the ordinances void *ab initio* and permanently enjoining Houston from imposing or collecting taxes in the area in dispute or otherwise exercising jurisdiction over such area.

Appellants first attack special issue number four and the jury's answer thereto. This issue inquired whether all plaintiffs wishing to be heard before the Houston City Coucil on the subject of the block annexation ordinance were given an opportunity to be heard. The court directed the jurors to answer either "all plaintiffs were not heard" or "all plaintiffs were heard." The city objects to this issue for the reason that the wording of the proposed answer suggests that the inquiry is whether all plaintiffs were heard and not whether all plaintiffs were given the opportunity to be heard. While we consider that the wording of the proposed answers was unduly favorable to the plaintiffs, we cannot say that the error was calculated to cause and probably did cause a rendition of an improper judgment.

The only evidence supporting the answer made to special issue number four was the testimony of Lynn Otto that she had signed up to speak at the hearing and was not given an opportunity to do so. Those wishing to be heard at the block annexation hearing were required to call the city secretary and sign up before 5:00 p.m. on Monday, August 8, 1977. The list furnished to the city council by the city secretary contained 291 names. Some of the names were marked out with a notation "cancelled." All of the names not marked out were called to speak, generally in the order in which they appeared on the list. One hundred seventy-nine of the people who signed up either spoke or had someone speak for them. One hundred seven people were not present when their names were called and did not speak. All of the speakers were opposed to the annexation.

Ms. Otto's name was not on the list. She testified that she signed up and that she saw her name added as the last name on the list. She was present at two sessions of the hearing, including the last session. Her name was never called. While her name did not appear on the list of speakers for the block annexation, it did appear as the last name on the list of speakers for the strip annexation. There is no evidence that Ms. Otto objected at the last session because her name was not called.

The hearings continued over parts of three days and consumed 16

hours. An orderly and reasonable procedure was followed in calling on the speakers, and there is no evidence that the city in any way stifled the opposition to its proposed action. If in fact Ms. Otto told the city secretary that she desired to speak to the block annexation ordinance, as she testified, rather than the strip ordinance, it is apparent that the city secretary inadvertently put her name on the wrong list of speakers. Because the failure to call Ms. Otto as a speaker was not called to the attention of the council, Ms. Otto's testimony is insufficient to support the answer of the jury that all plaintiffs were not given the opportunity to be heard. The city substantially complied with the provisions of Tex. Rev. Civ. Stat. Ann. art 970a, sec. 6 in effect at time ordinance 77-1668 was passed. [Footnote omitted.]

A statute should be construed as a whole; legislative intent should control, and common sense should govern. If possible, a court should place upon a statute a construction that will not result in injustice, unreasonableness, prejudice to the public interest, or absurd consequences. *National Surety Corp. v. Ladd*, 131 Tex. 295, 301, 115 S.W.2d 600, 603 (1938). *Texas Liquor Control Board v. Falstaff Distributing Co.*, 369 S.W.2d 483, 486 (Tex.Civ.App.—Houston 1963, no writ).

Special Issue No. four should not have been submitted to the jury, and the answer to such issue should have been disregarded. *See Cain v. Tennessee-Louisiana Oil Co.*, 382 S.W.2d 794, 799 (Tex.Civ.App.—Tyler 1964), *aff'd*, 400 S.W.2d 318 (Tex. 1966); *Lee v. Continental Trailways*, 564 S.W.2d 392, 394 (Tex.Civ.App.—Dallas 1978, writ ref'd n.r.e.).

To summarize, there is no evidence that Ms. Otto advised the city council that she had reserved time to speak, that her name had not been called, and that she wished to be heard. Consequently, there is no evidence that Ms. Otto was denied the opportunity to be heard. *See Kirkpatrick v. Raggio*, 319 S.W.2d 362, 366 (Tex.Civ.App.—Fort Worth 1958, writ ref'd n.r.e.).

The jury found in answer to special issue number six that the property described in the block annexation ordinance encroached upon the boundaries and extraterritorial jurisdiction of Pasadena, Webster, and Nassau Bay "as depicted in Plaintiffs' Exhibit No. 134." The jury also found, in answer to special issue number eight, that the property described in the block annexation ordinance was outside

the extraterritorial jurisdiction of Houston. Finally, the jury found, in answer to special issue number 11, that the City of Houston intended to disclaim extraterritorial jurisdiction west of the line set forth in the Houston/Pasadena agreement by which certain territories were exchanged and Houston specifically ceded to Pasadena extraterritorial jurisdiction in certain territory.

The limits of the extraterritorial jurisdiction of Houston and Pasadena depend largely on the validity of two Houston ordinances, 65-1555-AR and 65-1555-BR, which represented attempts by Houston to extend southward and to outflank Pasadena's annexations in the same general area. Litigation between Houston and Pasadena with regard to the validity of the two Houston annexation ordinances eventually reached the Supreme Court of Texas. In the *City of Pasadena v. State ex rel. City of Houston*, 12 Tex.Sup.Ct.J. 273 (Feb. 26, 1969), the Supreme Court held the City of Houston Ordinances void. However, a motion for rehearing was granted, the opinion was withdrawn, and a second opinion was issued holding that Pasadena had not properly preserved the issue of procedural defects in the passage of the ordinances. The case was remanded to the trial court. *City of Pasadena v. State ex rel. City of Houston*, 442 S.W.2d 325 (Tex. 1969).

Prior to the issuance of the second opinion, Pasadena and Houston jointly requested that the action be dismissed. The Supreme Court refused to grant the dismissal and issued the opinion. The withdrawn opinion must be treated as if it had never been rendered. *Mixon v. Wallis*, 161 S.W. 907, 911 (Tex.Civ.App.-San Antonio 1913, writ ref'd).

By a judgment signed on December 5, 1969, the district court granted a summary judgment declaring the Houston Annexation Ordinance No. 65-1555-BR valid and declaring certain Pasadena annexation ordinances invalid. On December 30, 1969, Houston Ordinance No. 69-2386 and Pasadena Ordinance No. 69-309 were finally passed. These two ordinances embodied an agreement between Houston and Pasadena, wherein the two cities exchanged some territory inside their corporate limits, and Houston released to Pasadena all of its extraterritorial jurisdiction to the east of a line running generally north and south at the east side of the Clear Lake City area.

Although it was not set out in the ordinances, it was understood between the two cities that the judgment of December 5, 1969, would

not be appealed. The two ordinances became effective on April 1, 1970. The summary judgment sustaining the validity of the Houston annexation ordinances became final within 30 days after it was signed on December 5, 1969, and as a result, it was final prior to the date the two ordinances became effective.

The plaintiffs contend that Houston's Annexation Ordinance No. 65-1555-BR is ineffective, despite the district court judgment of December 5, 1969, because the judgment was superseded by the settlement agreement. There is no direct evidence, written or otherwise, of an agreement between the two cities that the judgment would be set aside. In the absence of a proper ordinance authorizing the action, a city cannot abandon territory within its city limits even to implement an agreement with another city. *City of Hitchcock v. Longmire*, 572 S.W.2d 122, 126-27 (Tex.Civ.App.— Houston [1st Dist.] 1978, writ ref'd n.r.e.); *see* Houston City Charter, Art. 7, secs. 3 & 10. As a result, the territory described in the Houston Annexation Ordinance No. 65-1555-BR was validly annexed.

The evidence establishes that if Houston's extraterritorial jurisdiction is measured from the city limits as established by ordinance No. 65-1555-BR, the territory annexed subsequently by ordinance No. 77-1668, the block annexation, was within Houston's extraterritorial jurisdiction.

The jury found, in answer to special issue number 11, that the City of Houston intended to disclaim extraterritorial jurisdiction west of the line set forth in the Houston Ordinance No. 69-2386. This ordinance provided:

> The City of Houston hereby agrees and consents that, effective at 12:00 o'clock midnight on the 31st day of March, 1970, all of the unincorporated areas lying to the east of the line described in section 1 of this ordinance which are now within the extraterritorial jurisdiction of the City of Houston, overlapping or otherwise, shall, to the full extent permitted by law, become and be a part of the extraterritorial jurisdiction of the City of Pasadena.

The ordinance is silent as to the extraterritorial jurisdiction of the City of Houston west of the line described in section 1. By this ordinance, the City of Houston disclaimed extraterritorial jurisdiction

of the land east of the line set forth in the ordinance but not to the land west of that line.

"Extraterritorial jurisdiction" is a concept created by the Municipal Annexation Act, Tex.Rev.Civ.Stat.Ann. art. 970a, sec. 3 (Vernon 1963). By this act, a city having a population of 100,000 or more, such as Houston, was given extraterritorial jurisdiction over all contiguous unincorporated area within five miles of its city limits. Sec. 3(A)(5). Where cities were close together, such as Pasadena and Houston, the act created some overlapping extraterritorial jurisdiction. Section 3(B) of the act provides that overlapping extraterritorial jurisdiction can be resolved by mutual agreement or litigation. Section 7(A) provides that a city may annex territory only within its extraterritorial jurisdiction. Section 3(C) provides for the expansion of a city's extraterritorial jurisdiction when new territory is annexed, provided it does not conflict with already existing extraterritorial jurisdiction of another city. This section also provides that the extraterritorial jurisdiction of a city shall not be reduced without the written consent of the governing body of such city.

Special Issue number 11 did not ask whether the City of Houston disclaimed extraterritorial jurisdiction of the area west of the line set forth in ordinance 69-2386. It merely inquired as to the city's intention to disclaim extraterritorial jurisdiction in that area. This is an immaterial issue because the city could only disclaim its extraterritorial jurisdiction by an instrument in writing. Art. 970a, sec. 3(C). There is no evidence that the extraterritorial jurisdiction of the City of Houston was reduced west of the line set out in ordinance 69-2386 with the written consent of the Houston City Council as required by sec. 3(C) of the Municipal Annexation Act.

The *plaintiffs* contend that the rule of construction set out in *State v. Mauritz-Wells Co.*, 141 Tex. 634, 175 S.W.2d 238 (1943), is applicable in this case and demonstrates that Houston had no extraterritorial jurisdiction west of the line established by ordinance 69-2386. The doctrine referred to in that case was "the express mention or enumeration of one person, thing, consequence, or class is equivalent to an express exclusion of all others." *Id.* at 639, 175 S.W.2d at 241. At the time of this ordinance, Houston had extraterritorial jurisdiction both east and west of the line. If this doctrine is applicable, the ordinance's express disclaimer of jurisdiction of the area east of

the line would be an "express exclusion" of a disclaimer of jurisdiction of the area to the west of the line.

While the Houston/Pasadena agreement did not confer extraterritorial jurisdiction on Houston to the west of the dividing line, neither did it take away from Houston the extraterritorial jurisdiction that it acquired as a result of the annexation of territory by ordinance 65-1555-BR. Special issue number 11 should have been disregarded by the trial court in considering the judgment to be rendered.

In answer to special issue number six, the jury found that the Houston Block Annexation Ordinance encroached upon the extraterritorial jurisdiction of Pasadena, Webster, and Nassau Bay as well as the Webster city limits, "as depicted in Plaintiff's Exhibit 134." The evidence in this case establishes as a matter of law that all of the territory annexed by ordinance 77-1668 was within the exclusive extraterritorial jurisdiction of the City of Houston and that none of such territory encroached upon or extended into the extraterritorial jurisdiction of Pasadena, Webster, or Nassau Bay.

The boundaries and extraterritorial jurisdiction of Houston, Pasadena, and Webster on August 23, 1963, the effective date of Tex.Rev.Civ.Stat.Ann.art. 970a, are established by the testimony of David J. Millard, the plaintiffs' expert witness, and that of Ronald Heiser and Lonnie Pace, the expert witnesses produced by the defendants. There was no expansion of any such boundaries or extraterritorial jurisdiction of those cities prior to November 16, 1965. On that date, Houston enacted ordinance 65-1555-BR, and as a result of such annexation, Houston's extraterritorial jurisdiction expanded five miles from the new boundaries to include all contiguous territories not within the corporate limits or the extraterritorial jurisdiction of any other city. As a matter of law, the extraterritorial jurisdiction of Houston then abutted and surrounded the extraterritorial jurisdiction of Webster and extended through the northern portion of that area later incorporated as the City of Nassau Bay. Webster did not annex any territory fromm 1963 through November 16, 1965.

Nassau Bay was incorporated in 1970 and included within its boundaries certain territory within the extraterritorial jurisdiction of Houston. There is no evidence that Houston gave its consent to such incorporation or that it ever challenged the validity of such incorporation. In 1966, Webster, with the permission of the City of

Houston, annexed certain territories situated within the extraterritorial jurisdiction of Houston. As we have held, Houston's ordinance 69-2386 released to Pasadena all of Houston's territorial jurisdiction situated east of the line described in that ordinance, but at that time, it retained extraterritorial jurisdiction of all territory west of that line. Accordingly, Pasadena's annexation of the territory up to that line did not have the effect of expanding the extraterritorial jurisdiction of Pasadena into the area west of the line.

Plaintiffs' Exhibit 134 was prepared by Mr. Millard, a registered public surveyor, based upon his assumption that Houston had ceded or released to Pasadena all of its extraterritorial jurisdiction west of the jurisdictional dividing line described in ordinance 69-2386. He testified that if Houston retained jurisdiction west of the dividing line and if ordinance 65-1555-BR was valid, Houston's extraterritorial jurisdiction would extend southward to surround and abut the extraterritorial limits of Webster as they existed in 1963 and that Nassau Bay would have no extraterritorial jurisdiction to the north of its boundaries.

Plaintiffs' Exhibit 134 does not accurately depict the location of the extraterritorial jurisdictions of any of the cities shown thereon. There was no jury finding of actual encroachment upon the territory or extraterritorial jurisdiction of another city, only a finding of encroachment upon the extraterritorial jurisdiction of the other cities "as depicted on Plaintiffs' Exhibit 134." This exhibit and Mr. Millard's testimony relating thereto constitutes no evidence of encroachment as found by the jury in answer to special issue number six. This evidence was based upon a hypothesis without foundation and proves nothing. *See Whiteman v. Harris*, 123 S.W.2d 699 (Tex.Civ.App.—Fort Worth 1938, writ ref'd). Special issue number six should not have been submitted; and the jury's answer thereto should have been disregarded, because it was not supported by evidence having probative force. *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex.1966).

Nassua Bay was not incorporated until April 2, 1970. There is no evidence that Houston has ever released any of its extraterritorial jurisdiction to Nassau Bay. As a matter of law, under the evidence of this case, Nassau Bay had no extraterritorial jurisdiction to the north of its corporate boundary.

There is evidence that ordinance 77-1668 included in the description of the property annexed a small area of land annexed by the City of Webster. The same territory was again annexed to the City of Webster by an ordinance passed on February 20, 1978. A small portion of the territory described in this second ordinance extended into the city limits of the City of Houston. However, both the ordinances enacted by the City of Webster and ordinances 77-1668 contained savings or exclusion clauses excepting and excluding from the territory described in the ordinances any territory over which the annexing city had no jurisdiction.

An ordinance that attempts to annex territory within the extraterritorial jurisdiction or municipal boundaries of another city is void. *City of Waco v. City of McGregor*, 523 S.W.2d 649 (Tex.1975). Neither of the ordinances in question is void. The exclusion clauses carved out of the territory described in each ordinance any portion situated within the extraterritorial jurisdiction of another city. *See City of Houston v. Harris County Eastex Oaks Water & Sewer District*, 438 S.W.2d 941, 949 (Tex.Civ.App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

The jury also found, in answer to special issue number eight, that the property described in the Houston Block Annexation Ordinance was outside the extraterritorial jurisdiction of Houston. For the reasons set out in our discussion of special issue number six, we find that there is no evidence to support the jury's answer to special issue number eight. The trial court erred in failing to disregard the jury's answer to this special issue.

In answer to special issue number 10, the jury found that the property description in the block annexation ordinance failed to close. The description of a tract of real estate does not "close" if a surveyor starting at the recited beginning point and following the recited "calls" would fail to return to the beginning point. *See City of Clute v. City of Lake Jackson*, 559 S.W.2d 391, 394-95 (Tex.Civ.App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). The City of Houston contends that the undisputed evidence establishes as a matter of law that the property description was proper.

Ordinance 77-1668 was a legislative enactment of the City of Houston. The description of the territory annexed thereby was an integral part of such ordinance. The construction of a legislative enact-

ment is a function of the judiciary; it is a matter of law, not of fact. *See Associated Indemnity Corp. v. Oil Well Drilling Co.*, 258 S.W.2d 523, 527 (Tex.Civ.App.-Dallas 1953), *aff'd*, S.W.2d 697 (Tex.1954).

Where a survey may be plotted on the ground from an established corner called for in its field notes, which are not ambiguous, as a matter of law it must be so constructed on the ground. Where natural and artificial objects described cannot be located on the ground, the proper method of locating the lines and corners of a grant is by course and distance from the nearest recognized and established corner or artificial object with which the field notes are connected. If there are no natural or artificial marks called for in the field notes that *establish an error in the course or distance called for*, and if there is no evidence as to how the surveys were actually made on the ground, they must be run out by course and distance from known corners with which they connect by their calls. *Gilson v. Universal Realty Co.*, 378 S.W.2d 115, 117, 119-21 (Tex.Civ.App.-Houston 1964, writ ref'd n.r.e.).

While general rules of surveying have been formulated, and some calls have been accorded greater dignity than others, the lowest in dignity may be resorted to and adopted in arriving at the intention of the locator. For example, if a call for the line of an adjoining survey cannot be located with reasonable accuracy and certainty, it should not be permitted to prevail over a call for distance. *Taylor v. Higgins Oil & Fuel Co.*, 2 S.W.2d 288, 300-01 (Tex.Civ.App.—Beaumont 1928, writ dism'd).

All expert witnesses who testified in this case agreed that if the calls for course and distance found in the annexation ordinance were followed without regard to other descriptive matter in the field notes, there would be a proper closure.

An expert witness called by the City of Houston testified that he made a survey on the ground and found no difficulty in following the field notes to a proper closure. He found no natural or artificial marks called for in the field notes that establish an error in the courses or distances called for.

Mr. Millard, an expert witness called by the plaintiffs, testified that the field notes would not close because certain calls extended into boundaries of another municipal corporation and because other calls referred to a monument that could not be located on the ground

or by use of any document available to the public.

In determining whether or not calls in field notes are adequate to describe a particular property, that is, whether or not the calls close, the surveyor is not concerned with whether or not the call crosses the city limits of or the extraterritorial jurisdiction line of another city. He merely establishes the line on the ground. The validity of the annexation is not his concern. Mr. Millard's conclusion that the calls do not close was based in part upon his assumption that call No. 2 was "broken" or "stopped" by its encroachment upon his assumed extraterritorial jurisdiction and assumed boundary line of the City of Webster.

Mr. Millard testified that he was able to establish the beginning point of call No. 10 and, from the course and distance given therein, this call could be plotted. However, because he had been unable to ascertain the location of the proposed Choate Road, and because a call for distance was to terminate in the planned north right-of-way of such proposed road, he would not establish or plot the call. He refused to plot the call, because he was not sure the distance given actually terminated in the planned right-of-way line and because a call for an artificial monument prevails over a call for distance.

Mr. Millard testified that he would be unable to establish on the ground or plot calls no. 12 and 13 because these calls were for a line running along the proposed Choate Road, although he could do so by resorting to course and distance stated in each of the calls had there been no reference to Choate Road.

In addition to the metes and bounds description and the calls for the proposed Choate Road, the description found in the ordinance states that all lines, points, and corners described in call no. 4 and subsequent calls are located on the common extraterritorial jurisdiction boundary line between the City of Houston and the City of Pasadena as described in Houston Ordinance 69-2386, effective April 1, 1970. Mr. Millard testified that he was able to locate that line.

It is clear from the testimony of all the expert witnesses that the lines and corners called for in the metes and bounds description of the annexed territory as found in ordinance 77-1668 can be located on the ground and that the lines of the survey properly close. The trial court erred in denying defendants' motion for judgment non obstante veredicto insofar as it relied on the jury's answer to special

issue number 10. Undisputed evidence establishes as a matter of law that the property description forms a closure. Special issue number 10 should not have been submitted to the jury, and the answer made thereto should have been disregarded. *See Lower Nueces River Water Supply District v. Cartwright*, 274 S.W.2d 199, 202-05 (Tex.Civ.App.—San Antonio 1954, writ ref'd n.r.e.); *Gage v. Owen*, 435 S.W.2d 559, 562 (Tex.Civ.App.—Fort Worth 1968, writ ref'd n.r.e.); *Ehlers v. Delhi—Taylor Oil Corp.*, 350 S.W.2d 567, 572-73 (Tex. Civ. App.—San Antonio 1961, no writ); *City of Athens v. Andrews*, 231 S.W.2d 928,932,934 (Tex.Civ.App.—Dallas 1950, writ ref'd).

Pursuant to a written request of the Mayor of the City of Houston, the first assistant city secretary called a special meeting of the City Council of the City of Houston for Saturday, August 27, 1977, for the purpose of considering several matters related to the establishment of the boundaries of the City of Houston in the Clear Lake area of Harris County, Texas. One of the matters listed was "the introduction and first reading of an ordinance or ordinances annexing portions of the Clear Lake area to the City of Houston." This notice was posted on August 22, 1977.

Plaintiffs contend that the annexation was instituted by the posting of this notice. Section 6 of the Municipal Annexation Act provides that the annexation of territory by a city shall be brought to completion within 90 days of the date on which the governing body of such city institutes annexation proceedings. The annexation proceedings were completed 92 days after the date on which the notice was posted, but only 87 days from the date on which the ordinance was introduced and passed on first reading. We hold that the later date, August 27, 1977, was the date on which "the governing body instituted annexation proceedings." *See City of Duncanville v. City of Woodland Hills*, 489 S.W.2d 557, 558 (Tex.1972) (per curiam).

The undisputed evidence in this case establishes (1) that the area annexed by ordinance 77-1668 (the block ordinance) was within Houston's extraterritorial jurisdiction; (2) that this area was not within the extraterritorial jurisdiction or corporate boundaries of one or more other cities because of the exclusionary provisions of the ordinance; (3) that the property description in the ordinance effected a closure; and (4) that Houston complied with the procedural requirements of Tex.Rev.Civ.Stat.Ann. art. 970a, sec. 6 (The Municipal Annexa-

tion Act) both as to providing an opportunity for all interested persons to be heard and as to completing the annexation within 90 days.

In addition, the attack on the validity of ordinance 77-1668 was a collateral attack. The State of Texas, acting by and through the county attorney of Harris County, intervened in the cause by filing and information in the nature of quo warranto as a first amended plea in intervention. This amended plea contained no allegations challenging the validity of ordinance 77-1668.

As a general rule, the validity of an annexation ordinance can be attacked only by a direct suit in the nature of quo warranto by the State, or in a proceeding in which the State is a party. *Kuhn v. City of Yoakum*, 6 S.W.2d 91, 91-92 (Tex. Comm'n App.1928, judgment adopted). Private parties who are directly affected by an annexation ordinance, as by taxation, may collaterally attack such an ordinance if it is void; but it is their burden to prove such invalidity. *Fox Development Co. v. City of San Antonio*, 468 S.W.2d 338,339 (Tex.1971).

The State of Texas, as intervenor, was limited to the scope of relief sought by it in its petition in nature of quo warranto. *See City of West Lake Hills v. State ex rel. City of Austin, 466 S.W.2d 722, 728 (Tex.1971).* The City of Houston had a public hearing on this annexation and complied with the time and method of giving notice of such hearing prescribed by law. Plaintiffs' contention that all persons wishing to be heard at the hearing were not afforded that opportunity is a challenge directed towards an irregularity in the annexation process. If proven, it would not show an entire want of power on the part of the City to annex. Proof of irregularity in the exercise of annexation authority is not in itself a sufficient basis to declare the ordinance void. *May v. City of McKinney*, 479 S.W.2d 114, 120 (Tex.Civ.App.—Dallas 1972, writ ref'd n.r.e.); *Forbes v. City of Houston*, 304 S.W.2d 542, 546 (Tex.Civ.App.—Galveston 1957, writ ref'd n.r.e.), *cert. denied*, 357 U.S, 905, 78 S.Ct. 1151, 2 L.Ed.2d 1156 (1958). The collateral attack on the City of Houston ordinance based on the alleged failure to provide an opportunity for all interested persons to be heard cannot be sustained.

All of the land described in the strip annexation ordinance (No. 77-1423) lies within the territory annexed by the City of Houston by the block annexation ordinance. Therefore, if ordinance 77-1668

is valid, the validity of ordinance 77-1423 is irrelevant. The appellants have presented a number of points of error that have not been discussed individually, because the trial court erred in denying the appellants' motion for judgment non obstante veredicto insofar as the judgment relates to ordinance 77-1668.

Because we find Ordinance No. 77-1668 valid, we do not reach the points of error relating to Ordinance No. 77-1423.

The judgment declaring the City of Houston Ordinance 77-1668 void is reversed, and judgment is here rendered declaring said ordinance valid. The injuction is dissolved.

[DISTRICT COURT JUDGMENT]

No. 1,136,351

ROBERT T. SAVELY, Individually and as Chairman of the Retirement Plan for the Employees of the Clear Lake City Water Authority; CLEAR LAKE CITY WATER AUTHORITY; DAVID T. RILEY; WILLIAM C. FARRIES; JOCELYN H. OTTO; ALBERT L. LAPIDUS; M. S. SWERDLIN; JAMES L. ALLISON; SUSAN R. ALLISON, J. R. GARMAN; JAMES R. ATKINSON; KAREN ATKINSON; and JUDY R. LANE,	IN THE DISTRICT COURT
Plaintiffs,	
and THE STATE OF TEXAS,	
Intervenor as Party Plaintiff,	
V.	
CITY OF HOUSTON, TEXAS; KATHY WHITMIRE, Mayor of the City of Houston, Texas and successors; JIM McCONN, Mayor of the City of Houston, Texas; FRED HOFHEINZ, Mayor of the City of Houston, Texas; ANNA RUSSELL, City Secretary of Houston, Texas and successors; HENRY KRIEGEL, Controller and Treasurer of the City of Houston, Texas and successors; GUY GRISCOM, Tax Assessor and Collector of the City of Houston, Texas and successors; JUDSON ROBINSON, JR., LARRY McKASKLE, LOUIS MACEY, FRANK D. MANCUSO, JIM WESTMORELAND, FRANK E. MANN and JOHNNY GOYEN, members of the City Council, City of Houston, Texas and their successors; GEORGE GREANIAS, JIM GREENWOOD, ELEANOR TINSLEY, CHRISTIN HARTUNG, BEN REYES, DALE GORCZYNSKI, JOHN GOODNER, RODNEY ELLIS, ANTHONY HALL and ERNEST McGOWEN, members of the City Council, City of Houston, Texas and their successors,	HARRIS COUNTY, TEXAS 11TH JUDICIAL DISTRICT
Defendants.	

FINAL JUDGMENT AND ORDER OF PERMANENT INJUNCTION

BE IT REMEMBERED, on this day came before the Court, Plaintiffs, Intervenor, and Defendants, each through their respective attorneys of record, upon Plaintiffs' Motion for Entry of Judgment. The Court, having reviewed the pleadings, having called this case to trial November 12, 1984, having submitted this case to the jury on November 26, 1984 and having received and accepted the verdict of the jury on November 27, 1984 is of the opinion and finds under the authority of the laws of the State of Texas and of Tex.Rev.Civ.Stat.Ann.art. 2524-1 that judgment should be entered in favor of Plaintiffs and Intervenor and against Defendants 1) declaring City of Houston, Texas Ordinance Nos. 77-1423 and 77-1668 wholly void from and of the date of their respective passage by the City Council of Houston, Texas and of no legal force or effect and 2) permanently enjoining the City of Houston, Texas from providing services, levying taxes, and collecting taxes in the area purportedly annexed. The Court specifically finds that an Order of Permanent Injunction should be entered in accordance with this order and as reason finds that Plaintiffs and Intervenors would be irreparably harmed and have no other adequate remedy at law but for entry of an Order of Pemanent Injunction and further that the verdict of the jury, the evidence properly introduced at trial in support of such verdict, and the application of such verdict to the laws of the State of Texas show that the City of Houston, Texas never acquired jurisdiction over the territories purportedly annexed by virtue of City of Houston Ordinances 77-1423 and 77-1668 and that the City of Houston, Texas should thus be enjoined as specified herein.

IT IS, THEREFORE, ORDERED, ADJUDGED, DECREED, and DECLARED that the City of Houston, Texas, Ordinance No. 77-1423 is wholly void from and as of August 27, 1977 and that Ordinance No. 77-1423 is of no legal force or effect;

IT IS FURTHER ORDERED, ADJUDGED, DECREED, and DECLARED that City of Houston Ordinance No. 77-1668 is wholly void from and as of November 23, 1977 and that Ordinance 77-1668 is of no legal force or effect;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the City of Houston, its officers, agents, servants, employees, at-

torneys, or persons in active concert with them who receive actual notice of this Final Judgment and Order of Permanent Injunction, are hereby permanently restrained and enjoined from providing services, levying taxes, and collecting taxes and that the City of Houston, Texas, be hereby ousted from asserting any municipal jurisdiction in those territories (commonly known as the Clear Lake City area and purportedly annexed by virtue of City of Houston, Texas Ordinances 77-1423 and 77-1668) which have been previously described by the City of Houston, Texas to contain the territory exclusive of the exclusion tracts as follows:

[Long legal description of property omitted.]

IT IS FURTHER ORDERED, ADJUDGED and DECREED and found that Plaintiffs be required to post no bond and that the Order of Permanent Injunction contained herein shall take effect without the necessity of posting any bond;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Defendants' Motion for Judgment and Defendants' Motion for Judgment Non Obstante Verdicto be and hereby is in all things denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that costs be taxed to Defendants and that all relief requested in this case and not specifically granted herein is denied.

SIGNED this 21st day of February, 1985.

/s/
JUDGE PRESIDING

APPROVED AS TO FORM:

/s/
MICHAEL T. GALLAGHER
ATTORNEY FOR PLAINTIFFS

MIKE DRISCOLL
ATTORNEY FOR INTERVENOR
THE STATE OF TEXAS

/s/

WILLIAM P. OLSON
ATTORNEY FOR DEFENDANTS

[JURY ISSUES]

Special Issue No. 3

Do you find from a preponderance of the evidence that all plaintiffs wishing to be heard before the Houston City Council on the subject of the strip annexation ordinance, No. 77-1423, were not given the opportunity to be heard?

Answer "All plaintiffs were not heard"

or

"All plaintiffs were heard."

ANSWER: All plaintiffs were not heard.

Special Issue No. 4

Do you find from a preponderance of the evidence that all plaintiffs wishing to be heard before the Houston City Council on the subject of the block annexation ordinance No. 77-1668, were not given the opportunity to be heard?

Answer "All plaintiffs were not heard"

or

"All plaintiffs were heard."

ANSWER: All plaintiffs were not heard.

[PETITIONERS' MOTION FOR REHEARING BEFORE THE FIRST COURT OF APPEALS]

XVIII.

Point of Error No. 18. The Court of Appeals erred in reversing the judgment of the trial court and in dissolving the injunction issued by the trial court because "substantial compliance" is not the legal standard for compliance with Tex.Rev.Civ.Stat.Ann. art 970a, sec. 6 requiring that all interested persons be afforded an opportunity to be heard.

XIX.

Point of Error No. 19. The Court of Appeals erred in reversing the judgment of the trial court and in dissolving the injunction issued by the trial court because, even if substantial compliance is the legal standard, Appellants failed to substantially comply with Tex.Rev.Civ.Stat.Ann. art 970a, Sec. 6 as a matter of law by not affording an opportunity for all interested persons to be heard relative to Houston Ordinance 77-1668.

XX.

Point of Error No. 20. The Court of Appeals erred in reversing the judgment of the trial court and in dissolving the injunction issued by the trial court because there is some legally sufficient evidence that Appellants did not substantially comply with Tex.Rev.Civ.Stat.Ann. art 970a, sec. 6 in affording an opportunity for all interested persons to be heard relative to Houston Ordinance 77-1668.

XXI.

Point of Error No. 21. The Court of Appeals erred in reversing the judgment of the trial court and in dissolving the injunction issued by the trial court because Appellants failed to comply with Tex.Rev.Stat.Ann. art 970a, sec. 6 as a matter of law in not affording an opportunity for all interested persons to be heard relative to Houston Ordinance 77-1668.

XXII.

Point of Error No. 22. The Court of Appeals erred in reversing

the judgment of the trial court and in dissolving the injunction issued by the trial court because there is some legally sufficient evidence to support the jury's finding (Special Issue No. 4) that all interested persons were not heard in contravention of Tex.Rev.Civ.Stat.Ann. art 970a, sec. 6.

XXIII.

Point of Error No. 23. The Court of Appeals erred in reversing the judgment of the trial court and in dissolving the injunction issued by the trial court because the Court of Appeals failed to use the correct rules of law in reviewing the legal sufficiency and factual sufficiency of evidence. Specifically, the Court of Appeals erred in one or more of the following respects:

(a) by "finding" that Lynn Otto failed to object to the lack of opportunity to be heard;

(b) by "finding" that the Houston City Council did not stifle opposition to its annexation;

(c) by "finding" that Lynn Otto failed to advise the Houston City Council that she had reserved time, was not called to speak, and that she wished to be heard.

XL.

Point of Error No. 40. The Court of Appeals erred in reversing the judgment of the trial court and in dissolving the injunction issued by the trial court because Appellants failed to substantially comply with Tex.Rev.Civ.Stat.Ann. art 970a, Sec.6 as a matter of law by not affording an opportunity for all interested persons to be heard relative to Houston Ordinance 77-1423.

XLI.

Point of Error No. 41. The Court of Appeals erred in reversing the judgment of the trial court and in dissolving the injunction issued by the trial court because there is some legally sufficient evidence that Appellants did not substantially comply with Tex.Rev.Civ.Stat.Ann. art 970a, sec. 6 in affording an opportunity for all interested persons to be heard relative to the Houston Ordinance 77-1423.

XLII.

Point of Error No. 42. The Court of Appeals erred in reversing the judgment of the trial court and in dissolving the injunction issued by the trial court because Appellants failed to comply with Tex.Rev.Civ.Stat.Ann. art 970a, sec. 6 as a matter of law in not affording an opportunity for all interested persons to be heard relative to Houston Ordinance 77-1423.

XLIII.

Point of Error No. 43. The Court of Appeals erred in reversing the judgment of the trial court and in dissolving the injunction issued by the trial court because there is some legally sufficient evidence to support the jury's finding (Special Issue No. 3) that all interested persons were not heard in contravention of Tex.Rev.Civ.Stat.Ann. art 970a, sec. 6.

[PETITIONERS' POINTS OF ERROR TO THE SUPREME COURT OF TEXAS]

VII. All interested persons were not afforded an opportunity to be heard.

Points of Error 27-35

Point of Error No. 27. The court of appeals erred in reversing the judgment of the trial court because "substantial compliance" is not the legal standard for compliance with the requirement in Section 6 of the Municipal Annexation Act that all interested persons be afforded an opportunity to be heard. (Germane to Point 18 of Motion for Rehearing.)

Point of Error No. 28. The court of appeals erred in reversing the judgment of the trial court because, even if substantial compliance is the legal standard, Houston failed to substantially comply with Section 6 of the Municipal Annexation Act as a matter of law by not affording an opportunity for all interested persons to be heard relative to the Block Annexation Ordinance. (Germane to Point 19 of Motion for Rehearing.)

Point of Error No. 29. The court of appeals erred in reversing the judgment of the trial court because there is some legally sufficient evidence that Houston did not substantially comply with Section 6 of the Municipal Annexation Act by not affording an opportunity for all interested persons to be heard relative to the Block Annexation Ordinance. (Germane to Point 20 of Motion for Rehearing.)

Point of Error No. 30. The court of appeals erred in reversing the judgment of the trial court because Houston failed to comply with Section 6 of the Municipal Annexation Act as a matter of law by not affording an opportunity for all interested persons to be heard relative to the Block Annexation Ordinance. (Germane to Point 21 of Motion for Rehearing.)

Point of Error No. 31. The court of appeals erred in disregarding the jury's answer to Special Issue No. 4 and in reversing the judgment of the trial court because there is some legally sufficient evidence to support the jury's finding that all interested persons were not heard in contravention of Section 6 of the Municipal Annexation Act. (Germane to point 22 of Motion for Rehearing.)

Point of Error No. 32. The court of appeals erred in reversing the judgment of the trial court because Houston failed to substantially comply with Section 6 of the Municipal Annexation Act as a matter of law by not affording an opportunity for all interested persons to be heard relative to the Strip Annexation Ordinance. (Germane to Point 40 of Motion for Rehearing.)

Point of Error No. 33. The court of appeals erred in reversing the judgment of the trial court because there is some legally sufficient evidence that Houston did not substantially comply with Section 6 of the Municipal Annexation Act by not affording an opportunity for all interested persons to be heard relative to the Strip Annexation Ordinance. (Germane to Point 41 of Motion for Rehearing.)

Point of Error No. 34. The court of appeals erred in reversing the judgment of the trial court because Houston failed to comply with Section 6 of the Municipal Annexation Act as a matter of law by not affording an opportunity for all interested persons to be heard relative to the Strip Annexation Ordinance. (Germane to Point 42 of Motion for Rehearing.)

Point of Error No. 35. The court of appeals erred in disregarding the jury's answer to Special Issue No. 3 and in reversing the judgment of the trial court because there is some legally sufficient evidence to support the jury's finding that all interested persons were not heard in contravention of the Municipal Annexation Act. (Germane to Point 43 of Motion for Rehearing.)

XI. The court of appeals should not have substituted its findings for those of the jury.

Point of Error 43

Point of Error No. 43. The court of appeals erred in reversing the judgment of the trial court because the court of appeals failed to use the correct rules of law in reviewing the sufficiency of the evidence. Specifically, the court of appeals erred in one or more of the following respects:

(a) by "finding" that Lynn Otto failed to object to the lack of opportunity to be heard;

(b) by "finding" that the Houston City Council did not stifle opposition to its annexation;

(c) by "finding" that Lynn Otto failed to advise the Houston City Council that she had reserved time, was not called to speak, and that she wished to be heard.

(Germane to Point 23 of Motion for Rehearing.)

[MINUTES OF CITY COUNCIL HEARING — JULY 26, 1977]

. . . City Council Chamber, Tuesday, July 26, 1977. The City Council reconvened at 3:00 p.m. in the Council Chamber to complete the meeting.

Mayor Hofheinz stated that this was the time published for the hearing on the proposed annexation of territory by the City of Houston located in the vicinity of Clear Lake City and described in Ordinance No. 77-1380 passed July 13, 1972, calling this hearing, and that the amount of time reserved amounted to some eighteen hours and asked the pleasure of Council in establishing any rules for the hearing.

Motion No. 77-2759

Mayor Hofheinz introduced an Ordinance and requested that the ordinance be assigned a number by the City Secretary. Ordinance No. 77-1423 was assigned to the ordinance introduced by the Mayor.

Mayor Hofheinz stated that he would at this time appoint Councilmen Robinson, Mann and Goyen as members of the Ordinance Committee and request that the Committee review the ordinance just presented.

Motion No. 77-2760

Mayor Hofheinz requested confirmation by council of his appointment of the Ordinance Committee.

Motion No. 77-2761

A recommendation concerning Ordinance No. 77-1423 signed by members of the Ordinance Committee was submitted to the City council for consideration.

Motion No. 77-2762

Mayor Hofheinz announced that Council would begin hearing from those who had reserved time to be heard and in accordance with prior Motion adopted by Council that the hearing would be closed at 5:00 p.m. and that subsequent hearings would be called and residents in the area proposed for annexation to the City of Houston would be invited to appear.

Mayor Hofheinz called Mrs. Thomas M. Grubbs who was first on the list of speakers and Mrs. Grubbs came forward and stated

that she would like to relinquish her time to Mr. Tom Leonard and Mayor Hofheinz stated that under the rules of council it would be necessary to suspend the rules to hear from Mr. Leonard at this time.

Motion No. 77-2763

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mr. Tom Leonard, 5333 Azalea, Dallas, Texas;

Mrs. Wayne Picard, 16018 Havenhurst, Houston, Texas 77059;

Mrs. Douglas Doud, 16014 Havenhurst, Houston, Texas 77059;

Mr. Earl Legg, 1411 Richvale, Houston, Texas 77062;

Mrs. Earl Legg, 1411 Richavale, Houston, Texas 77062;

Mrs. Priscilla Heidbreder, 4014 Rolling Green Drive, Seabrook, Texas 77586;

Mr. William Roeh, 15215 Pleasant Valley, Houston, Texas 77062;

Mrs. Richard Harwood, 322 Forest Lake Drive, Seabrook, Texas 77586;

Mr. Wendell Deen, 15411 Torry Pines, Houston, Texas 77062;

Mrs. Eva Mathenia, 15314 Penn Hills, Houston, Texas 77062;

Mrs. Aurelia Nelson, 15718 Buccaneer, Houston, Texas 77062;

Mr. Richard S. Olofson, 16507 Brook Forest Drive, Houston, Texas 77059;

Mrs. Marilyn Crim, 5819 Buccaneer, Houston, Texas 77062;

Mrs. Linda Rose, 16522 Brook Forest Drive, Houston, Texas 77059;

Dr. James Delwood, 907 Bay Area Boulevard, Houston, Texas 77058;

Mr. Lloyd Richardson, 16115 LaAvenida, Houston, Texas 77062;

Mrs. Colleen Ecord, 1502 Seagate, Houston, Texas 77062;

Mr. Donald Kronenberger, 15507 Baybrooke, Houston, Texas 77062;

Mrs. David Guettner, 734 Seafoam, Houston, Texas 77062;

Mrs. Mary Lou Pawlowski, 15707 Bowstrit, Houston, Texas 77062;

Mr. David A. Butler, 754 Seamaster, Houston, Texas 77062;

Mrs. Wendy Kane, 15543 Torry Pines, Houston, Texas 77062;

Mr. Stephen J. Kane, 15442 Torry Pines, Houston, Texas 77062;

Mrs. Holly Ludlam, 15914 Buccaneer, Houston, Texas 77062;

Mr. Thomas Light, 803 Redway, Houston, Texas 77062;

Mr. Val Rovera, 1640 Seagate, Houston, Texas 77062;

Mayor Albert C. Richmond, 1202 Kirby Road, Seabrook, Texas 77586;

Mr. Harry Clagett, 1819 Bonanza Road, Houston, Texas 77062;

Mr. Clifford Hutchinson, 15422 Banff, Houston, Texas 77062;

Mrs. Jill Schultz, 727 Buoy Road, Houston, Texas 77062;

Mrs. John Branch, 16206 White Star, Houston, Texas 77062;

Mr. Randall Elbert, 710 Seamaster, Houston, Texas 77062;

Mr. Al Robinette, 1606 El Dorado Boulevard, Houston, Texas 77062.

Mr. Leonard Patillo, 1100 Milam Bldg., Houston, Texas 77002, appeared and spoke in favor of the proposed annexation.

Dr. Susan MacManus, 2027 Branard, Houston, Texas 77098, appeared and spoke in favor of the proposed annexation and presented to each member of Council an article she had written relative to tax structures in American cities - levels, reliance, and rates, which was published in The Western Political Quarterly, Vol. XXX, No. 2, June, 1977.

Mayor Hofheinz called Mr. F. S. Schell and Mr. Mark Swerdlein came forward and requested permission to speak in Mr. Schell's place inasmuch as Mr. Schell was not present and he had brought the map on display in the meeting.

Motion No. 77-2764

Mr. Swerdlein spoke against the proposed annexation and presented

to each member of Council packet of material containing information concerning the Clear Creek area.

Motion No. 77-2765

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mr. J. J. Herald, 1607 Redway Lane, Houston, Texas 77058;

Mrs. Helen Gaevert, 15534 Penn Hills, Houston, Texas 77062;

Mrs. Julia Guillory, 15518 Seahorse, Houston, Texas 77062;

Mrs. Edith Delwood, 15419 St. Cloud, Houston, Texas 77062;

Mr. David Guettner, 734 Seafoam, Houston, Texas 77062;

Mr. Gregory K. Lyon, 16411 Havenhurst, Houston, Texas 77058;

Ms. Marg Markiewicz, 1631 Beachcomber, Houston, Texas 77062;

Mr. Willie B. Williams, 2808 Wheeler, Houston, Texas 77004;

Mrs. Sunny Tucker, 15915 Brookford, Houston, Texas 77059.

Letter from Mr. A. M. Dowell, III, 16430 Locke Haven Drive, Houston, Texas 77059, opposing the annexation of Clear Lake City was presented as requested by Mr. Dowell inasmuch as he could not be present for the hearing.

Mayor Hofheinz made the following statement: "Ladies and Gentlemen: I would like to invite each of you who have not been able to be heard today due to the constraints of time on this Council to fully complete the hearing statement which was provided to you at the commencement of this hearing. I assure you that these documents will be reviewed in detail by both my office as well as other involved divisions of the City of Houston and will become a part of the official records of the City of Houston. If any of you arrived late and did not receive a copy of this form, the City Secretary will provide you with a copy."

Statement from Mr. Wilbur H. Frederking, 1325 Southwest Tower, Houston, Texas 77002, was received by the City Council on the form distributed to those present during the hearing.

Motion No. 77-2766

The entire hearing was recorded on tape and an official court reporter was present at the request of the City of Houston Legal Department.

Ordinance No. 77-1424

Motions No. 77-2767 through 77-2772

Approved

/s/
Mayor

[MINUTES OF CITY COUNCIL HEARING — AUGUST 9, 1977]

NO. 77-2935-1

City Council Chamber, Tuesday, August 9,1977, 9:00 a.m.- Adjourned Regular.

Mayor Hofheinz stated that this meeting was called to order pursuant to Council action setting a public hearing for the proposed annexation of that portion of the Clear Lake City Water Authority that lies within the extra territorial jurisdiction of the City of Houston and that any comments received in writing would also be considered and that a map showing the area was on display on the wall.

Mr. David Butler, 754 Seamaster, Houston, Texas 77062, appeared and opposed the proposed annexation.

Mayor Hofheinz called the following persons who had reserved time to speak but were not present in the Council Chamber when their names were called:

Mrs. C. J. Kresch, 4011 Hondurras, Pasadena, Texas 77504;

Mr. Frank Vaughan, 603 Packer Court, Webster, Texas 77598.

Mayor Hofheinz called Mrs. William Farries, 15407 Cabre Valley, Houston, Texas 77062, who came forward and requested that Mr. Ray Barnhart be allowed to speak in her place.

Motion No. 77-2936

Mr. Ray Barnhart appeared and opposed the proposed annexation.

Mayor Hofheinz called the following persons who appeared and opposed the proposed annexation:

Mr. Richard Jack Fountain, 16315 Clearcrest, Houston, Texas 77059;

Mr. Sam Dargan, 4317 Leeland, #3, Houston, Texas 77023;

Dr. M. Dean Woodruff, 16350 Craighurst, Houston, Texas 77059;

Mr. Al Lapidus, 1718 Gunwale, Houston, Texas 77062;

Mr. C. A. Brawner, 14203 Burgoyne, Houston, Texas 77077;

Mr. Victor Marks, 730 Redway, Houston, Texas 77062.

Mayor Hofheinz called Mr. David Hamilton, 16210 Longvale, Houston, Texas 77059, who had reserved time to speak but was not present in the Council chamber when his name was called.

Mayor Pro Tem Mancuso called the following persons who appeared and opposed the proposed annexation: Mayor Hofheinz absent. Mayor Pro Tem Mancuso presiding.

Mr. Edward Small, 4101 San Jacinto, Suite 227, Houston, Texas 77004;

Mrs. Sue Smith, 15903 Havenhurst, Houston, Texas 77059;

Mrs. John Hammond, 1719 Bonanza Road, Houston, Texas 77062;

Mayor Pro Tem Mancuso called mr. David Frasier, 1803 Bonanza Road, Houston, Texas 77062, who requested that Mr. Marvin DeLaney be allowed to speak in his place. Mayor Hofheinz absent. Mayor Pro Tem Mancuso presiding.

Motion No. 77-2937

Mr. Marvin DeLaney appeared and opposed the proposed annexation. Mayor Hofheinz absent. Mayor Pro Tem Mancuso presiding.

Mayor Pro Tem Mancuso called Mrs. Virginia Frasier, 1803 Bonanza Road, Houston, Texas 77062, who appeared and opposed the proposed annexation. Mayor Hofheinz absent. Mayor Pro Tem Mancuso presiding.

Mayor Pro Tem Mancuso called Mr. Bruce Fuller, 6353 Skyline Drive, #142, Houston, Texas 77057, who was not present when his name was called and Rep. Herman Lauholf came to the podium and requested that he be allowed to speak in Mr. Fuller's place. Mayor Hofheinz absent. Mayor Pro Tem Mancuso presiding.

Motion No. 77-2938

Rep. Herman Lauholf appeared and opposed the proposed annexation.

Mayor Hofheinz called Mr. Mark Swerdlin, 839 Silverpines Road, Houston, Texas 77062, who requested that the map be explained and Mayor Hofheinz stated that the map had been explained at the beginning of the meeting, that it showed that portion of Clear Lake City Water Authority that lies within the extra territorial jurisdiction of the City of Houston. Mr. Swerdlin requested a suspension of the rules

in order to ask questions of Council. No motion was heard. Mr. Swerdlin then asked the Council members present whether their minds were made up as to voting for annexation and they all responded "No". Councilman Robinson absent.

Mayor Hofheinz called the following persons who appeared and opposed the proposed annexation: Councilman Robinson absent.

Mr. Bill Schweinle, 15114 Torry Pines, Houston, Texas 77062;

Mr. James C. Smith, 15903 Havenhurst Drive, Houston, Texas 77059.

Mayor Hofheinz called the following persons who had reserved time to speak but were not present when their names were called: Councilmen Robinson and Ford absent.

Mr. Michael L. Slack, 6110 Renwick, 237A, Houston, Texas 77081;

Mr. Claude M. McCollum, 1410 Richdale, Houston, Texas 77062.

Mayor Hofheinz called Mr. Tom Leonard, 7107 Azalea Lane, Dallas, Texas 75230, who stated that he was the attorney employed to represent those opposed to the proposed annexation and spoke relative to legal questions involved. Councilman Ford absent.

Mayor Hofheinz called the following persons who had reserved time to speak but were not present when their names were called: Councilman Ford absent.

Judge Mike Driscoll, Box 849, La Porte, Texas 77571;

Mr. Charles L. Whynot, 16808 El Camino Real, Houston, Texas 77058.

Mayor Hofheinz called the following persons who appeared and opposed the proposed annexation: Councilman Ford absent.

Mr. Robert Savely, 1515 Neptune, Houston, Texas 77062;

Mr. David T. Riley, 1634 Beachcomber, Houston, Texas 77062.

At 10:55 a.m. Mayor Hofheinz announced that a recess had been requested and he would like to know Council's pleasure.

Motion No. 77-2939

At 11:10 a.m. the City Council reconvened in the Council Chamber

to continue the hearing and Mayor Hofheinz called the following persons who appeared and opposed the proposed annexation:

Mr. William C. Farries, 15407 Cobra Valley, Houston, Texas 77062;

Mr. Jim Koehn, 2603 Tip Cove, Austin, Texas 78704;

Mrs. Jane Cherry, 16603 Buccaneer, Houston, Texas 77062;

Mr. James Tidwell, 731 Silverpines Road, Houston, Texas 77062;

Miss Dorothy Banta, 16102 La Avenida, Houston, Texas 77062.

Mayor Hofheinz stated many of the speakers had questioned the ability of the City of Houston to provide police and fire protection to the Clear Lake area upon annexation and that Fire Chief Joe Perina and Police Chief Harry Caldwell were present and he would acknowledge a motion at this time to suspend the rules to hear from them.

Motion No. 77-2940

Chief Perino and Chief Caldwell appeared and upon questions by Council advised that services would be provided immediately upon final annexation.

Mr. Swerdlin requested that he be given permission to question Chief Perino and Chief Caldwell and Mayor Hofheinz ruled that he was out of order.

Mayor Hofheinz called the following persons who appeared and opposed the proposed annexation:

Frances Hicks, 1407 Seagate, Houston, Texas 77062;

Mr. Gerald Proctor, 16303 Clearcrest, Houston, Texas 77059;

Mr. Ben Boykin, 16207 Longvale Drive, Houston, Texas 77059.

Mayor Hofheinz called Mrs. Sara Neill, 1614 Richvale, Houston, Texas 77062, and she requested that Mr. Tom Leonard be allowed to speak in her place.

Motion No. 77-2941

Mr. Tom Leonard appeared and spoke relative to the procedures by the City of Houston of the proposed annexation.

Mayor Hofheinz stated that he would entertain a motion to recess the hearing at this time.

Motion No. 77-2942

At 12:00 noon upon motion by Councilmen Goyen and Westmoreland the City Council recessed and reconvened at 2:00 p.m. in the Council Chamber to continue the meeting.

Mayor Hofheinz stated that Council would now consider the regular agenda at this time. Councilman Westmoreland absent. . . .

At 3:55 p.m. Mayor Hofheinz stated that the Council would continue with the hearing on the proposed annexation of that portion of Clear Lake City Water Authority that lies within the extra territorial jurisdiction of the City of Houston.

Mayor Hofheinz called the following persons who appeared and opposed the proposed annexation: Councilmen Robinson, McKaskle and Westmoreland absent.

Mr. Bill Carmean, 1519 Seagate Lane, Houston, Texas 77062;

Mr. Ronald Pritchard, 1418 Festival, Houston, Texas 77062;

Mrs. Barbara Barrow, 1419 Festival, Houston, Texas 77062;

Mrs. Beverly DeMoss, 1654 Neptune Lane, Houston 77062.

Mayor Hofheinz called Mr. Mike Pytel, 1427 Festival, Houston, Texas 77062, who had reserved time to speak but was not present when his name was called. Councilmen Robinson, McKaskle and Westmoreland absent.

A man stood up in the audience and stated that he would like to question a point of order and upon request of Mayor Hofheinz stated that he was Mr. Morgan Leverton and he objected to the Councilmen talking on the telephone and Mayor Hofheinz stated that his question was not a point of order and he would rule him out of order. Councilmen Robinson, McKaskle and Westmoreland absent.

Mayor Hofheinz called the following persons who appeared and opposed the proposed annexation: Councilmen Robinson, McKaskle and Westmoreland absent.

Mrs. J. R. Cutler, 15215 Penn Hills, Houston, Texas 77062;

Mr. Norbert Alfred Olzmann, 16414 Shady Elms, Houston, Texas 77059;

Mrs. Laura Ast, 802 Seafoam Road, Houston, Texas 77062;

Mrs. Donald R. Ast, 802 Seafoam Road, Houston, Texas 77062;

Ms. Betsy Lambert, 1611 Richvale, Houston, Texas 77062;

Mr. Gordon Hrabal, 15414 Pleasant Valley, Houston, Texas 77062;

Mrs. Marilyn Proctor, 1602 Richvale, Houston, Texas 77062;

Mrs. Joan Lapidus, 1718 Gunwale, Houston, Texas 77062.

Mayor Hofheinz called the following persons who had reserved time to speak but were not present in the Council Chamber when their names were called: Councilmen Robinson and Westmoreland absent.

Mr. Bill Lyon, 1617 Festival Drive, Houston, Texas 77062;

Mr. Joseph G. Madden, 16315 Brookville, Houston, Texas 77059;

Mrs. Gwen Boykin, 16207 Longvale, Houston, Texas 77059.

Mrs. Phyliss Vandelindt, 16202 Longvale, Houston, Texas 77059.

Mayor Pro Tem Mancuso called Mr. William V. Argo, 15702 Sealiner, Houston, Texas 77062, who appeared and opposed the proposed annexation. Mayor Hofheinz and Councilmen Robinson and Westmoreland absent. Mayor Pro Tem Mancuso presiding.

At 4:35 p.m. upon motion by Councilmen Goyen and Mann the City Council recessed and reconvened at 4:53 p.m. to continue the hearing. Councilmen Robinson and Westmoreland absent.

Mayor Hofheinz called Mr. Hugh F. Grover, 16023 Fathom Lane, Houston, Texas 77062, who appeared and opposed the proposed annexation. Councilmen Robinson and Westmoreland absent.

Mayor Hofheinz called the following persons who had reserved time to speak but were not present in the Council Chamber when their names were called: Councilmen Robinson and Westmoreland absent.

Miss Karen Price and Mrs. Celia Price, 15719 Diana Lane, Houston, Texas 77062.

Mr. Swerdlin came forward and requested a suspension of the rules to read a statement by State Representative Chase Untermeyer and Mayor Hofheinz stated that a copy of the statement had previously been distributed to each member of Council and would be made a part of the record. Councilmen Robinson and Westmoreland absent.

Mayor Hofheinz called the following persons who appeared and opposed the proposed annexation: Councilmen Robinson and Westmoreland absent.

Mrs. Linda Jackson, 15315 Sea Horse, Houston, Texas 77062;

Mr. A. J. Rackowski, 16111 Sealiner, Houston, Texas 77062;

Mr.William A. Young, 15318 St. Cloud, Houston, Texas 77062;

Mrs. Carol Mireles, 906 Wavecrest, Houston, Texas 77062;

Mrs. Johnna Appenbrink, 16207 Mill Point, Houston, Texas 77059.

Mayor Hofheinz called the following persons who had reserved time to speak but were not present in the Council chamber when their names were called: Councilmen Robinson and Westmoreland absent.

Mr. J. Gordon Griffith, 1702 Gunwale, Houston, Texas 77062;

Miss Patricia DeMoss, 1654 Neptune, Houston, Texas 77062;

Mr. Richard Brotzman, 15410 Diana Lane, Houston, Texas 77062;

Mrs. Rose Mary Anderson, 1526 Neptune Lane, Houston, Texas 77062.

Mayor Hofheinz called Mr. Val Rovira, 1640 Seagate, Houston, Texas 77062, who requested that Mr. Al Lapidus be allowed to speak in his place. Councilmen Robinson and Westmoreland absent.

Motion No. 77- 3014

Mr. Al Lapidus appeared and opposed the proposed annexation.

Mayor Hofheinz called Mr. Thomas Light, 803 Redway Lane, Houston, Texas 77062, who requested that Mr. Robert Johnston be allowed to speak in his place. Councilmen Robinson and Westmoreland absent.

Mr. Robert Johnston, Assistant Fire Chief of Clear Lake City,

appeared and opposed the proposed annexation. Councilmen Robinson and Westmoreland absent.

Mayor Hofheinz called Ms. Billie Hayley, 16614 La Avenida, Houston, Texas 77062, who appeared and opposed the proposed annexation. Councilmen Robinson and Westmoreland absent.

Mr. Norman Leaverton, P. O. Box 58684, Houston, Texas 77058, appeared and opposed the proposed annexation and objected to the manner in which Council previously voted on the Annexation Ordinance on first reading and Councilman McKaskle explained Council's voting procedures to Mr. Leaverton. Councilmen Robinson and Westmoreland absent.

Councilman Ford suggested that Council determine a time certain for continuation of the hearing inasmuch as there were three and one-half pages of speakers that had not been heard and the matter was discussed by Council and several motions were made which were withdrawn during the discussion. Councilmen Robinson and Westmoreland absent.

Motions No. 77-3015 through 77-3018

Mayor Hofheinz called Mrs. Norman Leaverton, P. O. Box 58684, Houston, Texas 77058, who appeared and opposed the proposed annexation. Councilmen Robinson and Westmoreland absent.

Motion No. 77-3019

Mayor Hofheinz called Mr. Leonard Wright and Mrs. Anna Wright, 1907 Redway Lane, Houston, Texas 77062, who appeared and opposed the proposed annexation. Councilmen Robinson and Westmoreland absent.

At 6:10 p.m. Mayor Hofheinz stated that in accordance with Motion previously passed by Council the hearing was recessed until 2:00 p.m. Wednesday, August 10, 1977. Councilmen Robinson and Westmoreland absent.

The entire hearing was recorded on tape and an official court reporter was present at the request of the City of Houston Legal Department.

Approved

Mayor

Councilman Macey out of the City

[MINUTES OF CITY COUNCIL HEARING — AUGUST 10, 1977]

No. 77-3019-1

City Council Chamber, City Hall, Wednesday, August 10, 1977, 9:00 a.m.-Regular . . .

At 2:05 p.m. Mayor Hofheinz stated that a quorum of Council was present and that the Public Hearing would be resumed at this time on the proposed annexation of that portion of the Clear Lake City Water Authority that lies within the extra territorial jurisdiction of the City of Houston and called Ms. Linda Overcash, 926 Redway Lane, Houston, Texas 77062, who was not present in the Council Chamber when her name was called. Councilmen Westmoreland and Goyen absent. . . .

Mrs. Patty Branch, 16206 White Star, Houston, Texas 77062, appeared and opposed the proposed annexation and criticized members of Council for not attending a town meeting in Clear Lake City; that KULF Radio had announced that all Council members were invited. Councilman Mancuso advised Mrs. Branch that he had not been invited, and it was determined by all Council members present that none had received an invitation. Councilmen Westmoreland and Goyen absent.

Mr. Lloyd Richardson, 16115 La Avenida, Houston, Texas 77062, appeared and opposed the proposed annexation. Councilmen Westmoreland and Goyen absent.

Mrs. Christine Schaffer, 2014 Fairwind, Houston, Texas 77062, appeared and opposed the proposed annexation. Councilmen Westmoreland and Goyen absent.

Mayor Hofheinz called Mr. Jim Story, 1409 Ramada, Houston, Texas 77062, and he was not present in the Council Chamber when his name was called and a gentleman stepped up to the podium and requested that a Motion to suspend the rules be made in order for him to play a tape that Mr. Story had sent to the meeting inasmuch as he could not be present. No motion was heard. Councilmen Westmoreland and Goyen absent.

Mayor Hofheinz called the following persons who appeared and

spoke in opposition to the proposed annexation: Councilmen Westmoreland and Goyen absent.

Mr. Edward E. Dodd, 1723 Gūnwale, Houston, Texas 77062;

Mr. Steven Czarsty, 15925 Fathom Lane, Houston, Texas 77062;

Mr. Donald E. Baxter, 1525 Festival Drive, Houston, Texas 77062;

Mrs. A. E. Gorman, 15918 Torry Pines, Houston, Texas 77062;

Mrs. Robert Horner, 2011 Ramada, Houston, Texas 77062:

Mrs. Joan Mertens, 15318 Pleasant Valley, Houston, Texas 77062;

Mr. Russell Mertens, 15318 Pleasant Valley, Houston, Texas 77062;

Mrs. Joe Ella Bright, 951 Neptune Lane, Houston, Texas 77062.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called: Councilmen Westmoreland and Goyen absent.

Mrs. Alene Ganzer, 15922 Torry Pines, Houston, Texas 77062;

Mr. David L. Outterson, 3418 Ledgestone Drive, Houston, Texas 77059.

At 3:00 p.m. Mayor Hofheinz stated that in accordance with Motion passed on August 9, 1977 that the annexation hearing would be temporarily suspended for the purpose of holding a paving hearing previously advertised for this time. Councilmen Westmoreland and Goyen absent. . . .

Mayor Pro Tem Mancuso stated that Council would continue the hearing on the proposed annexation and called the following persons who appeared and opposed the proposed annexation: Mayor Hofheinz, Councilmen Westmoreland and Goyen absent. Mayor Pro Tem Mancuso presiding.

Mrs. Judy Wehner, 15802 Crestbrook, Houston, Texas 77059;

Mr. Harold Stevenson, 15323 Diana Lane, Houston, Texas 77062.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called. Councilmen Westmoreland and Goyen absent.

Mrs. Alandra Y. Evans, 16431 Heatherdale, Houston, Texas 77059;

Mr. Thomas M. Grubbs, 1119 Laurel Valley, Houston, Texas 77062.

Ms. Mary Ann McCullough, 15311 Penn Hills, Houston, Texas 77062, appeared and opposed the proposed annexation. Councilmen Westmoreland and Goyen absent.

Mr. David R. Anderson, 1526 Neptune, Houston, Texas 77062, was not present in the Council Chamber when his name was called and Mr. Mark Swerdlin came to the podium and requested that the rules be suspended to hear from a resident of Clear Lake City who was present today and would not be able to be present for the continuation of the hearing on Friday. No motion was heard. Councilmen Westmoreland and Goyen absent.

Mr. David Armstrong, 1114 Daymeadow, Houston, Texas 77062, appeared and requested that he be allowed 15 minutes to speak and that a motion be made to suspend the rules for the 15 minutes. No motion was heard. Mr. Armstrong spoke in opposition to the proposed annexation and objected to not being allowed 15 minutes to speak. Councilman Goyen absent.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation: Councilman Goyen absent.

Ms. Shirley Bertschler, 3811 Glenmeade, Houston, Texas 77059;

Mrs. Edwin J. Hander, 15[illegible]9 Penn Hills, Houston, Texas 77062;

Mrs. Gail Love, 15430 Torry Pines, Houston, Texas 77062;

Mr.Bruce Schraufnagel, 15414 Banff, Houston, Texas 77062;

Mr. Sam Wilson, 15719 Seavale Road, Houston, Texas 77062.

Mayor Hofheinz called Mr. James Lamoreux, 16203 Longvale, Houston, Texas 77059, who was not present in the Council Chamber when his name was called and Judge Mike Driscoll came forward and requested that a Motion be made to suspend the rules for him to speak at this time. No motion was heard and Mr. Mike Swerdlin attempted to offer an objection from the floor and Mayor Hofheinz stated that he was out of order and called the next speaker from the

reserved list of speakers. Councilman Goyen absent.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation: Councilman Goyen absent.

Mr. Howard Katz, 1419 Neptune, Houston, Texas 77062;

Mr. Richard Love, 15430 Torry Pines, Houston, Texas 77062;

Mrs. Florence Atkinson, 8660 Voyager, Houston, Texas 77062;

Mr. Claude Robertson, 15403 St. Cloud, Houston, Texas 77062;

Mr. Dale S. Burton, 15726 Fathom, Houston, Texas 77062;

Mr. Alfred J. Cannon, 16114 Thunder Bay, Houston, Texas 77062;

Mr. Henry J. Smahlik, 842 Ramada, Houston, Texas 77062;

Mrs. Elizabeth L. Holland, 1015 Laurel Valley, Houston, Texas 77062;

Mr. J. Gordon Grant, 15923 Mill Point, Houston, Texas 77059;

Mr. Donald E. Crowhurst, 1610 Capstan Road, Houston, Texas 77062;

Mrs.Charles McLouth, 15538 Penn Hills, Houston, Texas 77062.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called: Councilman Goyen absent.

Mrs. Judy Duppstadt, 1810 Neptune, Houston, Texas 77062;

Mr. Sam Williamson, 16014 Brookford, Houston, Texas 77059;

Mr. Harris Wilson Foster, 1631 Wavecrest, Houston, Texas 77062;

Mr. Gary B. Evans, 16431 Heatherdale, Houston, Texas 77059;

Mrs. Jerry McMurry, 807 Redway Lane, Houston, Texas 77062;

Mrs. Judy Mullen, 835 Redway, Houston, Texas 77062;

Mrs. Sandy Fabling, 935 Buoy, Houston, Texas 77062;

Mrs. Joan Evans, 811 Redway Lane, Houston, Texas 77062;

Mr. Maurice Evans, 811 Redway Lane, Houston, Texas 77062;

Mrs. Margie Welsh, 16662 La Avenida Drive, Houston, Texas 77062;

Mr. Charles McLouth, 15538 Penn Hills, Houston, Texas 77062;

Mayor Hofheinz called Mr. Michael Sanborn, 975 Buoy, Houston, Texas 77062, who came forward and requested that the rules be suspended for the purpose of allowing Judge Mike Driscoll two minutes of his five minute time. Councilmen Robinson, Westmoreland and Goyen absent.

Motion No. 77-3032

Judge Mike Driscoll and Mr. Michael Sanborn appeared and opposed the proposed annexation. Councilmen Robinson, Westmoreland and Goyen absent.

Mayor Hofheinz called the following persons who appeared and opposed the annexation: Councilmen Robinson and Goyen absent.

Mrs. Joann Bell, 878 Silver Pines, Houston, Texas 77062;

Mrs. Camille Glazer, 906 Beachcomber, Houston, Texas 77062;

Mr. Morton Glazer, 906 Beachcomber, Houston, Texas 77062;

Mr. Henry Bernick, 1202 Eldorado, Houston, Texas 77062.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called: Councilmen Robinson and Goyen absent.

Mr. Curtis Sitler, 15407 St. Cloud Drive, Houston, Texas 77062;

Mr. Robert Bock, 16506 Cliffrose, Houston, Texas 77062;

Mrs. Becky Bell, 1403 Richvale, Houston, Texas 77062;

Mr. Bill Bell, 878 Silver Pines, Houston, Texas 77062;

Mr.Clay Bailey, 915 Reseda, Houston, Texas 77062;

Ms. Deborah Elliott, 1515 Seagate, Houston, Texas 77062;

Mrs.Joseph Wall, 15542 Penn Hills, Houston, Texas 77062;

Mrs. Karl Riehm, 747 Richvale, Houston, Texas 77062;

Mr. Ron McMurry, 807 Redway Lane, Houston, Texas 77062.

At 6:00 p.m., the time previously established for recess, Coun-

cilman Ford stated that he had a request that prior to the recess Council hear from Mr. Floyd Turner, who was on crutches, inasmuch as it was difficult for Mr.Turner to return for the hearing on Friday. Councilmen Robinson and Goyen absent.

Motion No. 77-3033

Mr. Floyd Turner, 1918 Wavecrest, Houston, Texas 77062, appeared and opposed the proposed annexation. Councilmen Robinson and Goyen absent.

At 6:05 p.m. Mayor Hofheinz announced that in accordance with the Motion passed on August 9, 1977, that the hearing stood recessed until 9:00 a.m. August 12, 1977. Councilmen Robinson and Goyen absent.

The entire hearing was recorded on tape and an official court reporter was present at the request of the City of Houston Legal Department.

Approved

Mayor
Councilman Macey out of the City

[MINUTES OF CITY COUNCIL HEARING — AUGUST 12, 1977]

No. 77-3033-1

City Council Chamber City Hall, Friday, August 12,1977 - 9:00 a.m. - Adjourned Regular

Mayor Hofheinz called the meeting to order and stated that a quorum of Council was present and that the Public Hearing would be resumed at this time on the proposed annexation of that portion of the Clear Lake City Water Authority that lies within the extra territorial jurisdiction of the City of Houston and Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mr. James Allison, 1703 Neptune, Houston, Texas 77062;

Mrs. Joan Kronenberger, 15507 Baybrook, Houston, Texas 77062;

Mrs. Billie Wenzel, 1914 Redway, Houston, Texas 77058;

Ms. Florence Hendley, 1564 Silver Pines, Houston, Texas 77062.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mr. Fred Frere, 122 Lazywood, Seabrook, Texas 77586;

Mr. Carl Houck, 15511 Diana, Houston, Texas 77062.

Council discussed a previous engagement Council had made one month ago and Councilman Mann moved that Council recess at 11:30 a.m. and reconvene at 1:30 p.m., which was seconded by Councilman Goyen.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mr. Steve Rottler, 1869 Capri, Seabrook, Texas 77586;

Mr. Durwood McKinney, 16239 Brookford, Houston, Texas 77059;

Mrs. Mary Beth Rouse, 16007 Brookford, Houston, Texas 77059;

Mrs. Marian Hulan, 2003 Redway, Houston, Texas 77062;

Mrs. Ann Luedman, 16430 Brookford, Houston, Texas 77059;

Mr. Preston Harrison, 703 Silver Pines Road, Houston, Texas 77062;

Mr. James Townsend, 15719 Buccaneer, Houston, Texas 77062;

Mr. Robert Legler, 15414 Seahorse, Houston, Texas 77062;

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mr. Glen Atkinson, 8660 Voyager, Houston, Texas 77062;

Dr. James Delwood, 15419 St. Cloud, Houston, Texas 77062;

Mrs. Marilyn Iserman, 15507 St. Cloud, Houston, Texas 77062;

Mr. Eugene Iserman, 15507 St. Cloud, Houston, Texas 77062;

Mr. Tom Barrow, 1419 Festival, Houston, Texas 77062.

Mr. John Branch, 16206 Whitestar, Houston, Texas 77062, appeared and opposed the proposed annexation and stated that the former Mayor Welch had announced publicly that he felt the strip annexation of Clear Lake City was morally wrong. Upon a question of Councilman Goyen, Mr. Branch stated that the 5:00 p.m. news had been the voice of a commentary but that the 6:00 p.m. news had actually been former Mayor Welch's voice.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mr. Tom Barry, 2014 West Lake Road, Houston, Texas 77062;

Mrs. Mavis Ashabranner, 927 Redway, Houston, Texas 77062;

Mrs. Emily Brady, 16202 Buccaneer, Houston, Texas 77062;

Mr. Craig Slaresinich, 16511 Brookforest, Houston, Texas 77059.

Mr. Richard Reysa, 15702 Torry Pines, Houston, Texas 77062, appeared and spoke in opposition to the proposed annexation and upon question of Councilman Goyen stated that he had heard former Mayor Welch's voice on the news.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mr. Kenneth P. Allen, 722 Seafoam, Houston, Texas 77062;

Mr. Ernest McCullough, 15311 Penn Hills, Houston, Texas 77062;

Mrs. Sue Burleson, 943 Redway, Houston, Texas 77062;

Mr. Charles Robinson, 16103 LaCabana, Houston, Texas 77062.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mr. Robert Meyer, 1427 Neptune, Houston, Texas 77062; Ms. Gigi DeGroce, 842 Buoy, Houston, Texas 77058.

At 10:35 a.m. upon motion by Councilmen Goyen and Robinson the City Council recessed and reconvened in the Council Chamber at 10:40 to continue the Hearing.

Mayor Hofheinz called Mrs. Ruby Cubley, 1107 Reseda, Houston, Texas 77062, who appeared and spoke in opposition to the proposed annexation.

Mayor Hofheinz called Mr. Dean Cubley, 1107 Reseda, Houston, Texas 77062, but he was not present in the Council Chamber when his name was called.

Mr. Jerry E. West, 711 Louisiana, Suite 700, Houston, Texas 77002, appeared and spoke in opposition to the proposed annexation. Councilman Mann asked how long had he been at his Houston address and he replied he had been there seventeen years, but that he lived in Clear Lake City. Councilman Mann questioned Mr. West as to the subsidence in the Clear Lake City area; the sinking of the golf course and the negotiations with Del Webb, Inc. for the development of Clear Lake City.

A lady approached the podium and asked that she be allowed to speak and Mayor Hofheinz advised her that it would require a motion by Council to suspend the rules. No motion was heard. Mayor Hofheinz then called the following persons who appeared and spoke in opposition to the proposed annexation:

Mr. Paul Delloss, 15026 Torry Pines, Houston, Texas 77062;

Ms. Susan R. Allison, 1703 Neptune, Houston, Texas 77062;

Mr. Thomas Graves, 1618 Capstan, Houston, Texas 77062;

Mr. A. A. Aldrich, 631 Bayview, El Lago, Texas 77586;

Ms. Rema Lou Brown, 731 Buoy Road, Houston, Texas 77062.

The following persons had reserved time to speak but were not

present in the Council Chamber when their names were called:

Karen and James Atkinson, 16350 Clearcrest, Houston, Texas 77059;

Mr. Gib Larson, 15522 Banff, Houston, Texas 77062.

At 11:30 a.m. in accordance with Motion previously passed the Hearing recessed and Council reconvened at 1:30 p.m. to continue the Hearing.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Ms. Lee Holley, P. O. Box 173, Seabrook, Texas 77586;

Mr. Charles Kresch, 16214 Longvale, Houston, Texas 77059;

Mr. William C. Royster, 1702 Neptune Lane, Houston, Texas 77062.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mrs. Dotsy Hill, 15431 Torry Pines, Houston, Texas 77062;

Mrs. A. J. Cannon, 16114 Thunder Bay, Houston, Texas 77062.

Mr. Robert Johnston, 15314 Baybrook, Houston, Texas 77062, appeared and spoke in opposition to the proposed annexation and advised that he was among the thirty-five volunteer fire fighters for the Clear Lake City area and further stated that he understood Chief Perino had a plan for serving the area with fire protection and asked the Mayor to be advised of the plan. Mayor Hofheinz advised Mr. Johnston that his questions had been duly noted.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mrs. Richard E. Hinkle, 16402 Brookford, Houston, Texas 77059;

Mrs. Earlyne Metcalf, 1010 Bay Meadow, Houston, Texas 77062;

Mr. Curtis Blessitt, 16402 Havenport, Houston, Texas 77059;

Mr. Charles L. Otti, 15419 Torry Pines, Houston, Texas 77062;

Mrs. Ann Howell, 2003 Ramada Drive, Houston, Texas 77062;

Mrs. Aurella Nelson, 15718 Buccaneer, Houston, Texas 77062;

Mr. Kenneth Fowler, 1311 Reseda, Houston, Texas 77062;

Mr. Edgar Metcalf, 1010 Baymeadow, Houston, Texas 77062;

Mrs. Dorothy Mandelir 6540 El Camino Real, Houston, Texas 77062;

Ms. Truisje Schell, 15310 Cobre Valley, Houston, Texas 77062;

Mr. Jack F. DeMoss, 1654 Neptune Lane, Houston, Texas 77062;

Mrs. Sonia Swanson, 1520 Festival, Houston, Texas 77062;

Dr. Robert Howard Wolfe, Jr., 16378 Larkfield, Houston, Texas 77059;

Mr. Charles T. Brouland, 1111 Laurel Valley, Houston, Texas 77062;

Mrs. Kenneth J. Demel, 1618 Festival Drive, Houston, Texas 77062;

Mrs. William B. Solcher, 1703 Festival Drive, Houston, Texas 77062;

Mrs. Liz Jezewski, 15318 Corrie Valley Drive;

Mr. Thomas Ryan, 1503 Neptune, Houston, Texas 77062.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mrs. John Zeongast, 15414 St. Cloud, Houston, Texas 77062;

Mr. John C. Ayers, 15406 St. Cloud, Houston, Texas 77062;

Mr. Joseph L. Grisanti, 1123 Laurel Valley Road, Houston, Texas 77062;

Mr. C. R. Fabling, 935 Buoy, Houston, Texas 77062;

Mr. Cliff Hutchinson, 15422 Banff, Houston, Texas 77062;

Ms. Linda Babbs, 16405 El Camino Real, 4, Houston, Texas 77062;

Mr. James Drummond, 15807 Fathom Lane, Houston, Texas 77062;

Mr. Michaël Lynn Verges, 15218 Pleasant Valley Road, Houston, Texas 77062;

Mr. Frank Tangorra, 807 Silver Pine, Houston, Texas 77062;

Mr. Richard L. Bullock, 15214 Penn Hills, Houston, Texas 77062;

Mr. Mark Weinstein, 843 Silver Pines, Houston, Texas 77062;

Mrs. Linda Weinstein, 843 Silver Pines, Houston, Texas 77062;

Mr. Eugene Mendoza, 4101 San Jacinto, Houston, Texas 77004.

Upon motion by Councilmen Mann and Goyen the City Council recessed at 3:15 p.m. and reconvened in the Council Chamber at 3:30 p.m. to continue the Hearing.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mr. Jeff Leavitt, 1239 Bay Area Blvd., Houston, Texas 77058;

Mr. Louis Ramon, 1515 Richvale, Houston, Texas 77062;

Mrs. John Ulrich, 16231 Brookford, Houston, Texas 77062.

Mr. Spyras G. Varsas, 1622 Fairwind, Houston, Texas 77062, appeared and spoke in opposition to the proposed annexation.

Mrs. Julia Guillory, 15518 Seahorse, Houston, Texas 77062, stated she would like to give her time to Dr. Moore from the school in the Clear Lake City area inasmuch as he wanted to talk to City Council about the children. Mayor Hofheinz advised her that it would require a motion by council to suspend the rules. No motion was heard and Mayor Hofheinz advised Mrs. Guillory to continue. Mrs.Guillory then spoke in opposition to the proposed annexation.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mr. Curtiss E. Vetter, 1710 Gunvale, Houston, Texas 77062;

Mr. William J. Daley, 15211 Deana Lane, Houston, Texas 77062.

Mr. Harry Hulen, 2003 Redway Lane, Houston, Texas 77062, had reserved time to speak but was not present in the Council Chamber when his name was called.

Mr. Kevin Paul McCullough, 15311 Penn Hills Lane, Houston, Texas 77062, requested Council to give his time to someone else and when Mayor Hofheinz heard no motion to suspend the rules,

advised Mr. McCullough to continue, who spoke in opposition to the proposed annexation.

Mrs. Rebecca McKinney, 16239 Brookford, Houston, Texas 77059, had reserved time to speak but was not present in the Council Chamber when her name was called.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mr. Andy T. Lim, 831 Reseda, Houston, Texas 77062;

Mr. David Guettner, 734 Sea Foam, Houston, Texas 77062;

Mr. Fred Heath, 1207 El Dorado, Houston, Texas 77062;

Mrs. Maureen Cannon, 16022 Havenhurst, Houston, Texas 77062;

Mrs. Debbie Thieman, 16023 Millpoint, Houston, Texas 77059;

Mr. Arnold Levine, 15110 Torry Pines, Houston, Texas 77062;

Mr. Don Krongenberger, 15507 Baybrook, Houston, Texas 77062;

Mr. Phillip C. Gynn, 16502 Laurelfield, Houston, Texas 77062;

Mrs. Jessie Fowler, 1311 Reseda, Houston, Texas 77062;

Mr.Don McCutchen, 755 Sea Foam, Houston, Texas 77062;

Mrs. Julia Jacoby, 1110 Bay Meadow, Houston, Texas 77062;

Mr. Mark Riley, 1634 Beachcomber, Houston, Texas 77062;

Mr. Gordon Johnson, 2010 Fairwind, Houston, Texas 77062;

Mr. Britt Spivey, 1410 Reseda, Houston, Texas 77062;

Mr. Don Brown, 15119 St. Cloud, Houston, Texas 77062;

Mr. James Booker, 1718 Capstan, Houston, Texas 77062;

Mrs. Dorothy Purdy, 15210 Seahorse Drive, Houston, Texas 77062.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mr. George Hall, 1413 Bonanza, Houston, Texas 77062;

Mr. Gerald Buerger, 16111 La Cabana, Houston, Texas 77062;

Mr. Mick Wion, 16422 Larkfield, Houston, Texas 77059;

Mrs. Marjorie B. Johnson, 907 Redway, Houston, Texas 77062;

Mrs. Helen Gaevert, 15534 Banff, Houston, Texas 77062;

Mr. Stephen Koewen, 7575 Office City Drive, 1816, Houston, Texas 77012;

Mrs. Nancy Johnson, 2010 Fairwind, Houston, Texas 77062;

Mrs. Glenda Rowe, 15402 Pleasant Valley, Houston, Texas 77062;

Mr. Michael Pierson, 16355 Craighurst, Houston, Texas 77059;

Mr. Robert Bradshaw, 1405 Bonanza, Houston, Texas 77062;

Mrs. Emily Marsh, 1935 Ramada, Houston, Texas 77062;

Mr. Barron Cagle, 16215 Cavendish Drive, Houston, Texas 77059.

Mr. Wade Webster, 15226 St. Cloud, Houston, Texas 77062, stated he would like to be the last speaker. No motion was heard and Mayor Hofheinz advised Mr. Webster to continue. Mr. Webster then spoke in opposition to the proposed annexation.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mrs. Gene Peter, 2011 Silver Pines, Houston, Texas 77062;

Mr. Wendell Dean, 15411 Torry Pines, Houston, Texas 77062;

Mr. R. F. Palmer, 2003 Huntress, Houston, Texas 77062;

Mrs. Donna DeFife, 15322 Penn Hills, Houston, Texas 77062.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mr. Bob Warren, 974 Richvale Lane, Houston, Texas 77062;

Mr. Gilbert Good, 15310 Baybrook, Houston, Texas 77062;

Mrs. Joanne White, 15722 SeaLark, Houston, Texas 77062;

Mr. J. E. Dugas, 16821 Buccaneer, 110, Houston, Texas 77058;

Mrs. Phyllis Kresch, 16214 Longvale, Houston, Texas 77059;

Mr. Kim Anson, 16006 Mill Point, Houston, Texas 77059.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mr. Charles L. Seaman, 15706 Sea Liner Drive, Houston, Texas 77062;

Mr. Edward Schlosser, 819 Seafoam, Houston, Texas 77062;

Mr. W. C. Morgan, 718 El Toro, Houston, Texas 77062;

Mr. John Hammond, 1719 Bonanza, Houston, Texas 77062;

Mr. Paul Coan, 16510 Clear Crook, Houston, Texas 77059.

The following persons had reserved time to speak but were not present in the Council Chamber when their names were called:

Mr. Floyd Schell, 15310 Cobre Valley, Houston, Texas 77062;

Mr. John Gladden, 16002 Mill Point, Houston, Texas 77058;

Mr. Paul Shack, 762 Voyager, Houston, Texas 77062.

Upon motion by Councilmen Mann and Goyen the City Council recessed at 6:17 p.m. and reconvened in the Council Chamber at 6:30 p.m. to continue the Hearing.

Mayor Hofheinz called the following persons who appeared and spoke in opposition to the proposed annexation:

Mr. James Lex Smith, 730 Seafoam Road, Houston, Texas 77062;

Mr. Charles Curtis, 723 Seafoam Road, Houston, Texas 77062;

Mrs. Florence Vacker, 15527 Seahorse, Houston, Texas 77062;

Mrs. Mary Rasmussen, 1519 Beach- comber, Houston, Texas 77062;

Mr. Bryden Rasmussen, 1519 Beachcomber, Houston, Texas 77062;

Mrs. Donna Nicodemus, 16215 La Cabana, Houston, Texas 77062;

Mr. Ariel J. Thomann, 15307 Cobre Valley, Houston, Texas 77062.

Mr. Gary Dudley, 1023 Montour Drive, Houston, Texas 77062, and Ms. Ann Seaman, 15706 Sea Liner, Houston, Texas 77062, had reserved time to speak but were not present in the Council Chamber when their names were called.

Mr. D. D. Lagrone, 15418 Seahorse, Houston, Texas 77062, appeared and spoke in opposition to the proposed annexation and re-

quested that all other persons who had called the City Secretary's office be heard by City Council. Mayor Hofheinz advised Mr.Lagrone of the deadline of Monday, August 8,1977 at 5:00 p.m. for making reservations to speak at this Hearing.

Mayor Hofheinz advised that City Council had been in session for 18-1/2 hours during this Hearing and that a quorum of the City Council was present.

The entire hearing was recorded on tape and an official court reporter was present at the request of the City of Houston Legal Department.

Approved

/s/
Mayor

Councilman McKaskle out of the
City on City business
Councilmen Macey, Mancuso and
Westmoreland out of the City

Supreme Court, U.S.
FILED
MAY 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1694

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT T. SAVELY, ET AL.,
Petitioners

v.

CITY OF HOUSTON, TEXAS, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM A. OLSON
OLSON & OLSON
MCorp Plaza, Suite 3485
333 Clay Street
Houston, Texas 77002
(713) 759-0696

Counsel of Record for Respondents

May 21, 1987

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

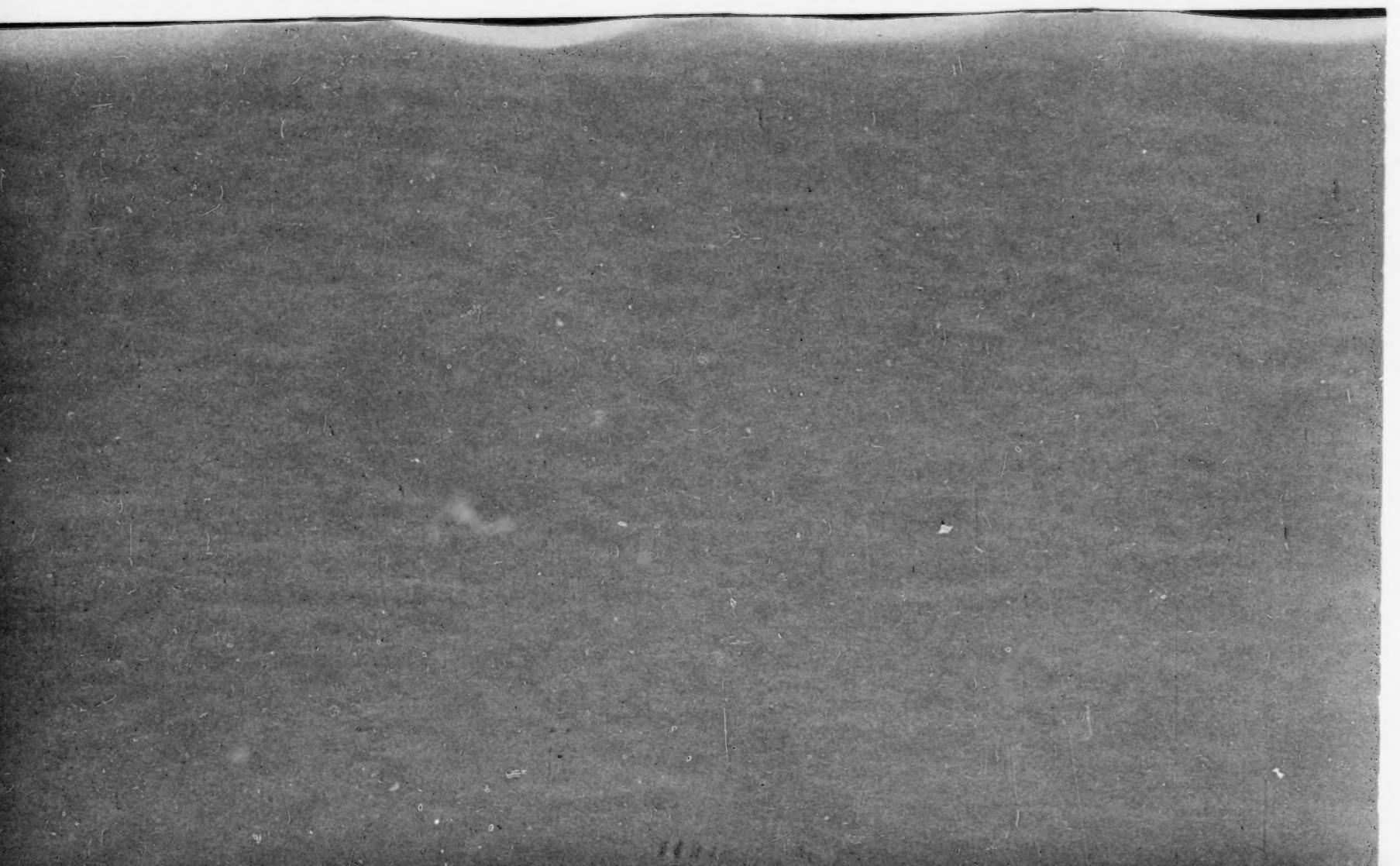

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	II-III
LACK OF JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	17
1. Neither the decision below nor the record raises the Question Presented in the petition	17
2. The Question Presented has no factual support in the record	22
3. The Question Presented is insubstantial; and the judgment of the First Court of Appeals was based on independent and adequate state grounds	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES

	Page
Baily v. Anderson, 326 U.S. 203 (1945)	21
Beck v. Washington, 369 U.S. 541 (1962)	19, 21
Bell v. Maryland, 378 U.S. 226 (1964)	22
Benton v. Maryland, 395 U.S. 784 (1969)	20
Cardinale v. Louisiana, 394 U.S. 437 (1969)	22
Consolidated Edison Co. of New York v. Public Service Commission of New York, 447 U.S. 530 (1980)	24
Cox v. New Hampshire, 312 U.S. 569 (1941)	24
Fuller v. Oregon, 417 U.S. 40 (1974)	18
Hunter v. City of Pittsburgh, 207 U.S. 161 (1907)	25
La Sara Grain Co. v. First National Bank of Mercedes, 673 S.W.2d 558 (Tex. 1984)	21
Live Oak Water Users' Ass'n v. Railroad Commission of California, 269 U.S. 354 (1926)	19
Life Insurance Co. of North America v. First National Bank of Fort Worth, 464 S.W.2d 362 (Tex. 1971)	21
Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934)	26
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	20
State of Texas ex rel. Pan American Production Co. v. Texas City, 303 S.W.2d 780 (1957), appeal dismissed, 355 U.S. 603 (1958)	25
Street v. New York, 394 U.S. 576 (1969)	18
Wallace v. Scrogum, 372 S.W.2d 941 (Tex. 1963)	21
Webb v. Webb, 451 U.S. 493 (1981)	22

Page

UNITED STATES CODE

28 U.S.C. § 1257 ..... 17, 20

UNITED STATES SUPREME COURT RULES

Rule 21 ..... 17, 22

TEXAS REVISED CIVIL STATUTES

Article 970a 4, 13, 14
Article 1175 3

TEXAS RULES OF APPELLATE PROCEDURE

Rule 130 13
Rule 131 13
Rule 190 15

TEXAS RULES OF CIVIL PROCEDURE

Rule 414 11
Rule 420 12
Rule 468 13
Rule 469 13

CITY OF HOUSTON, TEXAS,
CHARTER AND ORDINANCES

Charter, Article I, Section 2b 3
Code of Ordinances, Article I, Section 2.2 6

NO. 86-1694

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT T. SAVELY, ET AL.,
Petitioners

v.

CITY OF HOUSTON, TEXAS, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, the City of Houston, Texas, et al. ("Houston"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion in this case by the Court of Appeals for the First Supreme Judicial District of Texas ("First Court of Appeals"). That opinion is reported at 708 S.W.2d 879 and is reprinted in the appendix to the petition for writ of certiorari ("petition") at page A1.

LACK OF JURISDICTION

Neither the Question Presented in the petition (p. i) nor any other federal issue was raised or decided in the First Court of Appeals or in the Supreme Court of Texas; therefore, this Court lacks jurisdiction in this cause.

STATEMENT OF THE CASE

Petitioners' statement of the case is convoluted, misleading, incomplete, and inaccurate. The following accurately reflects those facts material to consideration of the question presented in the petition. Unless otherwise indicated references are to the record in the district (trial) court. "Tr." refers to the Transcript of the record; "SF" refers to the Statement of Facts; and "Px." and "Dx." refer to plaintiffs' exhibits and defendants' exhibits, respectively.

This is a municipal annexation case. The validities of two Houston annexation ordinances, No. 77-1423 (Dx. 5) and No. 77-1668 (Dx. 11), were in issue in the district court. The opinion of the First Court of Appeals correctly states the nature and result of the case.

Ordinance No. 77-1423, referred to by petitioners as the "strip annexation ordinance," was enacted on August 27, 1977. Ordinance No. 77-1668, referred to by petitioners as the "block annexation ordinance," was enacted approximately three months later on November 23, 1977. The boundaries of the territory described in and annexed by the latter ordinance encompass all of the territory described in and annexed by the former ordinance. The validity of such latter ordinance is in no manner dependent upon the validity of such former ordinance. Therefore, as held by the First Court of Appeals, the

validity of Ordinance No. 77-1423 is an immaterial or moot question. For this reason, the matters hereafter set forth relate to facts and issues peculiar to Ordinance No. 77-1668.

Houston's Authority to Annex. Houston is a home rule city of the State of Texas. The home rule charter of the City (HOUSTON, TEX., CHARTER, art. I, §2b [1913]) provides in pertinent part the following:

> The City Council shall have power by ordinance to fix the boundary limits of the said City of Houston and to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said City with or without the consent of the territory and inhabitants annexed.

TEX. REV. CIV. STAT. ANN. art. 1175 (Vernon 1963) enumerates certain of the powers of Texas home rule cities:

> Cities adopting the charter or amendment hereunder shall have full power of local self-government and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

Section 2 of such Article reads in pertinent part as follows:

> The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, . . . according to such rules as may be provided by said charter not inconsistent with the procedural rules prescribed by the Municipal Annexation Act.

During all material times, the Municipal Annexation Act (TEX. REV. CIV. STAT. ANN. art. 970a, § 6 [Vernon 1963]; 1965 TEX. GEN. LAWS, ch. 163, § 1 at 345) provided in pertinent part the following:

> Before any city may institute annexation proceedings, the governing body of such city shall provide an opportunity for all interested persons to be heard at a public hearing . . . Notice of such hearing shall be published in a newspaper having general circulation in the city and in the territory proposed to be annexed. The notice shall be published at least once in such newspaper not more than twenty (20) days nor less than ten (10) days prior to the hearing.

The public hearings regarding both Ordinance No. 77-1423 and Ordinance No. 77-1668 were duly and timely noticed and held. These facts are not in dispute.

Petitioners' Pleadings in the Trial Court. Petitioners filed their suit in 1977; they went to trial on their Eighth Amended Original Petition (Tr. 135). Such pleading challenged the validity of both ordinances on a variety of grounds; however, only those allegations contained in paragraphs XIX and XXIX thereof are of possible pertinence here. Such paragraphs read, respectively, as follows:

> XIX.
>
> First, the actions of Defendants as to both the Strip Annexation and the Block Annexation denied to Plaintiffs and others the opportunity to be heard in violation of Section 6 of the Municipal Annexation Act.
>
> . . . . .

XXIX.

> Defendants denied to Plaintiffs and others an opportunity to speak, assemble, or petition their government. Such denial by Defendants infringed the First Amendment rights of Plaintiffs in that local officials discriminatorily exercised their discretion and prohibited Plaintiffs and other residents of Clear Lake City from having an equal opportunity to express their views as were customarily afforded to other persons and other groups in violation of U. S. CONST. amend. 1 and TEX. CONST. article 1, section 8.

Petitioners pursued the former of these allegations throughout the trial and appeal of this cause. However, the latter allegation (First Amendment) was not further mentioned, advanced, or pursued in the trial or appellate courts of Texas.

A few months before trial, the State, on the relation of petitioners and acting by and through the County Attorney of Harris County, Texas, intervened in the cause by filing an information in the nature of quo warranto (Tr. 44). However, such plea challenged only the validity of Ordinance No. 77-1423; and that challenge was based solely on procedural grounds. No constitutional issues were raised in intervenor's pleadings.

This case was tried before a jury in November of 1984. At the conclusion of the evidence, it was submitted to the jury on eleven Special Issues, most of which were answered favorably to petitioners. The only such special issue of possible materiality here (Special Issue No. 4; Pet. App., p. A19; Tr. 77) inquired whether "[A]ll plaintiffs wishing to be heard before the Houston City Council on the subject of the block annexation Ordinance

No. 77-1668, were not given the opportunity to be heard?" As submitted by the trial court, the only answers to this Issue available to the jury were "All plaintiffs were not heard" or "All plaintiffs were heard." The jury answered "All plaintiffs were not heard." There was not a jury finding that all plaintiffs were not given the opportunity to be heard.

Procedures Governing the Public Hearings. The following provisions from HOUSTON, TEX., CODE, art. I, § 2.2 (1968) were in effect during all material times:

> The following rules of procedure shall govern all meetings and proceedings of the city council . . . :
>
> (f) *Right of citizens to be heard.* Any citizen of the City shall have a reasonable opportunity to be heard at all regular and special meetings in regard to any and all matters to be considered at such meetings that are germane and relative to any subject matter of city affairs or business which is within the scope of the authority and legislative functions of the city council. Provided, however, that the time allowed for each citizen's appearance before city council shall be limited to five minutes unless the rules of council be suspended. Any member of the city council shall have the privilege of raising a point of order as to whether the subject matter to be heard and considered as presented by a citizen is germane and relative to any subject matter of city affairs or business that are to be considered by the city council.

By Motion No. 74-2838, passed by the Houston City Council on August 21, 1974, and relating to public appearances before the City Council, the following policy regarding reserving time to speak was adopted:

> You may come in person to the City Secretary's Office, Room 203, Second Floor, City Hall or call

> 222-3301. Your reservation must be made prior to 9:00 o'clock a.m. of the Wednesday on which you wish to appear. For night meetings held at 7:00 o'clock p.m., reservations must be made by 5:00 o'clock p.m. on the day of the meeting. No reservations will be accepted by the City Secretary's Office after this time.

By Motion No. 76-347, adopted by the Houston City Council on January 27, 1976, the following rules were established by the City Council for public hearings "in addition to the rules of Council governing appearances by members of the public at the Regular Council Meeting each week:"

1. That time be reserved not later than one hour prior to the time scheduled for the hearing to begin;
2. That each speaker be allowed a maximum of five minutes;
3. That the speakers be grouped in categories by the amount of time required.

Summary of the Evidence. The following is a summary of the material evidence introduced at trial relating to Special Issue No. 4 (the "opportunity to be heard" issue regarding Ordinance No. 77-1668) and to the Question Presented in the petition:

The public hearing regarding Houston's proposal to institute proceedings to annex the territory subsequently annexed by Ordinance No. 77-1668 was held by the Houston City Council in the Council Chambers of the City Hall over a span of three days, August 9, 10, and 12, 1977, and consumed more than sixteen hours (Dxs. 8, 9, and 10). At the outset of the hearing, Houston's

Mayor publicly announced that any comments submitted in writing would also be considered by the City Council (Dx. 8).

Two hundred ninety-one persons reserved time to speak at such hearing; however, several of these cancelled their request to speak before the hearing began (Dx. 7). The name of each person who reserved time to speak was called during the course of the hearing and that person was afforded the opportunity to address the City Council at that time (Dxs. 8, 9, and 10). One hundred and seventy-nine persons responded when their names were called; all spoke in opposition to the proposal of the City Council to institute the annexation proceedings in issue (Dxs. 8, 9, and 10).

Nine of the twelve individual petitioners (plaintiffs in the trial court) registered to speak at the hearing (Dx. 7). Of this nine, two (Karen Atkinson and James R. Atkinson) did not respond when their names were called (Dx. 10, p. 3); the other seven (Lapidus, Swerdlin, Savely, Riley, Farries, James L. Allison, and Susan R. Allison) did respond and spoke in opposition to the proposed annexation (Dx. 8, pp. 1-6 and Dx. 10, pp. 1-2). In addition, two of petitioners' attorneys spoke in opposition to the proposed annexation (Dx. 8, pp. 2-3).

During the course of trial, three plaintiffs (petitioners) presented testimony regarding the public hearing. Mr. Riley stated that he registered to speak and did in fact speak in opposition to the proposed annexation (SF 422). Mr. Savely was uncertain as to whether he registered to speak and as to whether he did speak at the hearing (SF 730). The official minutes of the City Council (Dx. 8, p. 2) confirm that both Mr. Riley and Mr. Savely

spoke in opposition to the proposed annexation during the course of the hearing on August 9, 1977.

Mrs. Jocelyn (Lynn) Otto testified that she reserved time to speak at an annexation public hearing, but that she did not speak. She stated that because of the lapse of time she was uncertain as to the public hearing for which she registered to speak, but believed it was the one held in August rather than the one held in July (SF 683). (The July public hearing related to the other annexation ordinance originally in issue, No. 77-1423, and has no materiality here). Mrs. Otto said that she thought she attended a portion of such August hearing on one or two days and if her name was called during such time she did not hear it (SF 689-690).

The only matter Mrs. Otto testified to with any degree of certainty was that she specifically recalled that her name was the last name appearing on the list of those persons who reserved time to speak. She stated that the reason she was certain of this was because she had made her reservation to speak by telephone; that when she arrived for the hearing her name did not appear on the list of those who had registered to speak; that she called this omission to the attention of someone in the City Secretary's office; and that she saw that person place her name on the list as the last speaker (SF 681-682).

Mrs. Otto's name does not appear on the list (Dx. 7) of those who reserved time to speak at the August 9, 10, and 12 hearing pertaining to the territory subsequently annexed by Ordinance No. 77-1668; however, it does appear, as the last name, on the list of those persons who reserved time to speak at the public hearing on July 26, 1977 (Dx. 3) regarding the proposal to institute

proceedings to annex that territory ultimately annexed by Ordinance No. 77-1423.

Other than the vague testimony of Mrs. Otto, there was no evidence suggesting or implying that any plaintiff wishing to be heard at the public hearing in issue was not afforded that opportunity. There was no evidence that such public hearing was not fairly conducted. There was no evidence that the Houston City Council was not keenly aware of opposition to its proposal to institute annexation proceedings. There was no evidence that the Houston City Council was not fully apprised of each and every reason why petitioners and others were opposed to the annexation of the territory in issue.

Other than the qualified testimony of Mrs. Otto, there was no evidence that anyone who registered to speak at the public hearing was not called upon to speak and afforded the opportunity to express his or her views. There was no evidence that Mrs. Otto was denied the opportunity to speak at such hearing. There was no evidence that she advised the City Council, or any other representative of the City, that she had registered to speak, or that her name had not been called, or that she desired to be heard. And there was no evidence that had she spoken she would have advanced any reasons for being opposed to the proposed annexation different from those reasons advanced by the one hundred seventy-nine persons, including her attorneys and seven of her fellow petitioners, who did speak.

Rules Governing Appellate Procedure in Texas and the Appellate History in This Case. After the jury returned its verdict (Tr. 74), petitioners filed a motion for judgment based on such verdict (Tr. 103). Houston

filed a motion for judgment non obstante veredicto (Tr. 84). The former was granted; the latter was denied (Tr. 115, 124). Neither in such motion for judgment (Tr. 103) nor the accompanying brief in support thereof did petitioners mention or allude to a constitutional issue in any manner or make reference to a provision of the Constitutions of the United States or of the State of Texas. The judgment of the trial court (Pet. App., p. A16; Tr. 115) was based solely on the jury's verdict; it does not mention or allude to or was it based on a constitutional issue.

Houston timely appealed the district court's judgment to the First Court of Appeals. Procedural rules governing the appeal of judgments in Texas courts are prescribed by the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure. An appeal from a judgment of a district court to a court of appeals is by brief. Requirements relating to such a brief are set forth in TEX. R. CIV. P. 414 (Vernon 1985), which provides in pertinent part the following:

> (d) Points of Error. A statement of the points upon which the application is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found.
>
> (e) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal. The argument should include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the point of error complained of.

TEX. R. CIV. P. 420 (Vernon 1985) relates to appellees' brief. Such rule reads as follows:

> The brief of the appellee shall reply to the points of error relied upon by the appellant in due order when practicable; and in case the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief for appellants.

As a matter of practice and procedure in Texas, points of error advanced by an appellee in a court of appeals are denominated "cross points of error." As appellees in the First Court of Appeals, petitioners advanced two cross points of error; however, neither related to the Question Presented here; neither addressed a constitutional issue. Rather, both such cross points, which are quoted below, related to procedural matters under the Municipal Annexation Act:

> *Cross Point 1.* The judgment of the trial court should be affirmed for the reason that Appellants failed to comply with TEX. REV. CIV. STAT. ANN. art. 970a, Sec. 6, in that Ordinance No. 77-1668 was not completed within 90 days of the institution of annexation proceedings.
>
> *Cross Point 2.* The judgment of the trial court should be affirmed for the reason that Appellants failed to comply with TEX. REV. CIV. STAT. ANN. art. 970a, Sec. 6, in that a public hearing regarding Ordinance No. 77-1423 was held less than 10 days after the proceedings relative to Ordinance No. 77-1423 were instituted.

Neither by cross point of error nor by argument in their brief in the First Court of Appeals did petitioners raise,

mention, or allude to a constitutional issue of any nature. Nor did the judgment and opinion of such court (Pet. App., p. A1), which reversed the judgment of the trial court and rendered judgment upholding the validity of Ordinance No. 77-1668, address, consider, mention, or pass upon such an issue.

Petitioners' motion for rehearing in the First Court of Appeals contained forty-eight alleged points of error, ten of which (Pet. App., pp. 21-23) petitioners now contend raised the constitutional issues set forth in the Question Presented. None of such ten points of error mentions a constitutional provision or issue or infers the presence of any constitutional question. Indeed, all such points of error relate to procedural matters under the Municipal Annexation Act (TEX. REV. CIV. STAT. ANN. art. 970a [Vernon 1963; Vernon Supp. 1986]).

During all material times, TEX. R. CIV. P. 468 (Vernon 1985), now TEX. R. CIV. P. 130 (Vernon Supp. 1987), provided in pertinent part the following regarding the method of review of judgments of a Court of Appeals by the Supreme Court:

> (a) Method of Review. The Supreme Court may review final judgments of the court of appeals upon writ of error.

TEX. R. CIV. P. 469 (Vernon 1985), now TEX. R. APP. P. 131 (Vernon Supp. 1987), prescribes the requisites of an application for writ of error. It provides in pertinent part the following:

> (e) Points of Error. A statement of the points upon which the application is predicated shall be stated in short form without argument and be separ-

> ately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. Whether the matter complained of originated in the trial court or in the Court of Appeals, it must be assigned as error in the motion for rehearing in the Court of Appeals. Points will be sufficient if they direct the attention of the court to the error relied upon. Complaints about several issues or findings relating to one element of recovery or defense may be combined in one point, if separate record references are made.
>
> (f) Brief of the Argument. The brief of the argument may present separately or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

Petitioners' application for writ of error to the Supreme Court of Texas assigned forty-four points of error. Ten of these (Pet. App., pp. A24-26) are relied upon by petitioners as support for their claim that the Question Presented was raised in such court. None of such points of error or the arguments advanced thereunder contains a reference to a constitutional provision or mentions, advances, or alludes to a constitutional issue. Indeed, each such point of error relates solely to issues regarding procedures under the Municipal Annexation Act (TEX. REV. CIV. STAT. ANN. art. 970a [Vernon 1963; Vernon Supp. 1986]).

As reflected in the petition, the Supreme Court of Texas refused petitioners' application for writ of error with the notation "no reversible error." TEX. R. APP. P. 190 (Vernon 1986) authorizes the filing of a motion for rehearing following an order of the Texas Supreme Court refusing an application for writ of error. Such rule reads in part as follows:

> (b) Contents and Service. The points of error relied upon for the rehearing shall be distinctly specified in the motion.

Petitioners filed such a motion for rehearing and set forth therein only one point of error, which reads as follows:

> Petitioners' Application for Writ of Error should be granted because the territory purportedly annexed by Houston was not within the exclusive extraterritorial jurisdiction (ETJ) of Houston as a matter of law, but was instead within the ETJ or territorial boundaries of other municipalities as a matter of law.

Challenge of Petitioners' Statement of the Case. As heretofore stated, petitioners' statement of the case is inaccurate and misleading; it is also argumentative. Houston will not address each of these inaccuracies, misrepresentations, and arguments, but feels compelled to respond to the following:

Petitioners' state that the "annexation also precluded residents from voting in the Houston election in November of 1977" (Pet. p. 3). This is a base canard. The annexation did not preclude anyone from voting. Those persons who were duly registered to vote and who resided in Houston at the time of such election were entitled to vote

at such election. This matter was not and is not an issue in this case. Houston can only assume it is mentioned here because petitioners feel it may imply some underlying sinister and devious ploy by Houston.

Of similar character and purpose is the statement made by petitioners under their argument wherein they represent that "the purpose of the two-step annexation process was to disenfranchise residents of the Clear Lake Area" (Pet. p. 7). Such statement is totally false. The "two-step annexation process" did not disenfranchise anyone; that was neither its purpose nor its effect. There is not a shred of evidence to support petitioners' statement and, indeed, the matter mentioned therein was not an issue below and is not an issue here.

Petitioners' statement that "[e]ach of the hearings was designed and conducted to deny a fair hearing to those opposed to the Clear Lake annexations" (Pet. p. 3) is untrue, has no support in the record below, and is contrary to the specific holding of the First Court of Appeals (Pet. App., p. A3).

Finally, petitioners' dogmatic assertion that there "constitutional arguments were fairly brought to the attention of the Texas courts" (Pet. p. 5) is argumentative, blatantly untrue in Houston's opinion, and a matter for this Court, not petitioners, or respondents, to decide.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the Question Presented in the petition.

Under the circumstances of this case, the jurisdictional statute involved requires that petitioners must have specially set up or claimed in the highest state court that right or privilege under the Constitution of the United States which they seek to have invoked in this Court. 28 U.S.C.A. § 1257(3) (West 1966; West Supp. 1987). This they did not do.

Additionally, SUP. CT. R. 21(h), 28 U.S.C.A. (West 1984), requires petitioners to "specify the stage in the proceedings in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." This petitioners did not and, under the record, cannot do; their attempt to do so is strained, constrained, and wanting.

Neither the Question Presented nor any element thereof was raised in the First Court of Appeals or the Supreme Court of Texas. No opinion was issued by the latter court; it simply refused petitioners' application for writ of error with the notation "no reversible error." The opinion of the First Court of Appeals (Pet. App. p. A1) does not mention, much less pass upon, the Question Presented or any other federal issue; it does not cite a constitutional provision or any authority relating thereto. And it is firmly established that when "the highest state court has failed to pass upon a federal question, it will

be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Street v. New York,* 394 U.S. 576, 582 (1969); *Fuller v. Oregon,* 417 U.S. 40, 50 n. 11 (1974). Petitioners have not and, under the record below, cannot meet this burden.

By their pleadings in the trial court, petitioners alleged generally that Houston "infringed the First Amendment rights of Plaintiffs." (Pet. p. 4). Such pleadings made no mention of the Fourteenth Amendment or did they contain any allegation regarding the deprivation of a right or privilege guaranteed thereby. From and after the filing of said pleadings, petitioners' actions clearly establish that they abandoned such First Amendment claim in the state courts. They did not further assert such claim in the trial court. The judgment of that court (Pet. App., p. A15) does not address or mention a constitutional issue, federal or state. As appellees in the First Court of Appeals, petitioners had the opportunity to raise the First Amendment issue, but they did not. They presented two cross points of error (*supra,* p. 12) in their brief in such court; however, neither remotely related to a constitutional issue. And, as heretofore stated, the opinion of the First Court of Appeals (Pet. App. p. A1) does not, expressly or impliedly, pass upon the Question Presented or any other constitutional issue; or does it mention or allude to a constitutional provision or question or cite any authority applicable to the same.

None of the forty-eight points of error set forth in petitioners' motion for rehearing in the First Court of Appeals and none of the forty-four points of error relied on by them in their application for writ of error to the

Supreme Court of Texas mentions a constitutional provision or expressly or impliedly raises the Question Presented here or any other constitutional issue. The same is true with respect to the argument and authorities advanced by petitioners under the various points of error contained in their application for writ of error.

Petitioners acknowledge that they did not cite or refer to any constitutional provision in the various points of error set forth in their application for writ of error (Pet. p. 5). They also acknowledge, at least tacitly, that they did not cite or refer to any constitutional provision or issue in the arguments advanced by them in their brief in the First Court of Appeals and in their application for writ of error in the Supreme Court of Texas.

As sole support for their contention that they raised the Question Presented in the First Court of Appeals, petitioners quote, out of context, one sentence and a part of another from their lengthy brief (Pet. p. 4). Neither of such sentences was advanced in connection with nor makes reference to a constitutional provision or question. Neither has substance, nor support in the evidence, nor is accompanied by citation to supporting authority. Further, petitioners' brief in the First Court of Appeals is not a part of the record before this Court and argument made therein cannot be used to establish that a federal question was raised below. *Live Oak Water Users' Ass'n v. Railroad Commission of California,* 269 U.S. 354 (1926). Even if the sentences under discussion had specifically mentioned a federal issue, such act would not constitute a proper predicate for the Question Presented. The mere mention of such a matter in a sentence in the argument of a lengthy brief does not raise the issue. *Beck v. Washington,* 369 U.S. 541, 553 (1962).

The foregoing notwithstanding, the issue is not whether the Question Presented was raised in the First Court of Appeals, but whether it was raised in the Supreme Court of Texas, "the highest state court." 28 U.S.C.A. § 1257 (West 1966; West Supp. 1987); *Benton v. Maryland*, 395 U.S. 784 (1969).

Petitioners set forth ten of the points of error included in their application for writ of error to the Texas Supreme Court (Pet. App., pp. A24-26) and, by implication at least, contend that each and all of such points raised in such court the Question Presented here. Such contention is without merit. None of such points of error mentions a constitutional provision or expressly or impliedly asserts a constitutional issue. The first nine of such points refer specifically to the Municipal Annexation Act and relate solely to questions regarding compliance with procedural requirements set forth therein. The thrust of the tenth is that the First Court of Appeals "failed to use the correct rules of law in reviewing the sufficiency of the evidence." Certainly, none of these points of error raised a constitutional issue. Certainly, there is nothing in the record of this cause that shows, as this Court requires, that the federal claim advanced here was brought to the attention of the Supreme Court of Texas with "fair precision." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

The record below clearly reflects that petitioners did not make proper presentation of the Question Presented in the state courts. This fact is underscored by the following well established rules regarding appellate practice and procedure in Texas:

Alleged error of a Court of Appeals not raised by point of error in an application for writ of error in the Supreme

Court is waived. *Life Insurance Co. of North America v. First National Bank of Fort Worth,* 464 S.W.2d 362 (Tex. 1971). Even if a question is presented by point of error in an application for writ of error, if it were not preserved in a motion for rehearing in the Court of Appeals it could not be considered by the Supreme Court. *Wallace v. Scrogum,* 372 S.W.2d 941 (Tex. 1963). And, even if properly raised, a point of error not briefed is waived. *La Sara Grain Co. v. First National Bank of Mercedes,* 673 S.W.2d 558 (Tex. 1984).

Petitioner did not present the Question Presented, or any shade thereof, by point of error in their application for writ of error to the Texas Supreme Court or by point of error in their motion for rehearing in the First Court of Appeals, or did they cite any constitutional provision or advance any constitutional issue by argument in either their brief in such Court of Appeals or in their application for writ of error in the Supreme Court. This total failure of petitioners to advance or preserve the Question Presented in the state courts is forcefully demonstrated by their motion for rehearing in the Supreme Court of Texas wherein they set forth only one point of error (*supra,* p. 15) and it was totally unrelated to any constitutional issue. And having failed to pursue such question in the Supreme Court of Texas in the manner and with the specificity required by established rules of appellate practice in Texas, petitioners have waived any right they might otherwise have had to have this Court consider the same. *Beck v. Washington,* 369 U.S. 541 (1962); *Baily v. Anderson,* 326 U.S. 203 (1945).

Petitioners wholly failed to raise the constitutional issue in question in the state appellate courts; none of such courts considered or ruled on that or any other constitu-

tional issue; therefore, this Court is without jurisdiction in this case and the petition should be dismissed. *Webb v. Webb*, 451 U.S. 493 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

2. The Question Presented has no factual support in the record.

Not only did petitioners fail to raise any federal issue in the appellate courts of Texas, the Question Presented has absolutely no factual support in the record below. For this reason such question fails to comply with the requirements of SUP. CT. R. 21, 28 U.S.C.A. (West 1984); it is not expressed in the terms and circumstances in the case.

Nothing in the record suggests even remotely that the City Council of Houston imposed any "content-based restrictions" on those who spoke or appeared to speak at the public hearing in issue; or that it "arbitrarily limited" the number of speakers at such hearing; or that it called "persons to speak in an undisclosed order." Such Question Presented is further hypothetical and abstract in that it inquires of "persons" generally rather than of "petitioners." For each and all of the foregoing reasons, said question calls for an impermissible advisory opinion. *Bell v. Maryland*, 378 U.S. 226, 237 (1964).

There was no evidence that the Houston City Council imposed any "content-based restrictions" on those who spoke or appeared to speak at the public hearing. Indeed, all evidence was to the contrary. All interested persons who wished to speak at the hearing were afforded that opportunity, regardless of their position on the matter under consideration. All they were required to do was to

register to speak and to be present when their names were called. Certainly nothing can more forcefully establish the "content-neutrality" of these requirements than the undisputed facts in this case. Of the one hundred seventy-nine persons who actually spoke at such hearing, all spoke in opposition to the proposed annexation.

There was no evidence that the City Council, arbitrarily or otherwise, limited the number of speakers at the hearing in issue. Any and all persons who registered to speak and responded when their names were called were permitted to speak. The only possible basis for petitioners' representations that the City Council "arbitrarily" limited the number of speakers at the hearing must be the qualified testimony of Mrs. Otto. Such testimony has previously been summarized herein (*supra,* p. 9). Mrs. Otto thought she registered to speak at the hearing; she attended a portion of such hearing; she desired to speak; she did not speak; and if her name were called to speak she did not hear it. Her name was not called; it did not appear on the list of those who reserved time to speak at the hearing. However, she was not denied the opportunity to speak. There was no evidence that she, or anyone else, advised the City Council or any other City official that her name had not been called or that she desired to speak. There was no evidence that any member of the City Council knew Mrs. Otto; or knew that she was present at the hearing, or that she desired to speak, or what her position was regarding the proposed annexation.

There was no evidence that at the hearing in issue the City Council called "persons to speak in an undisclosed order." Under the rules of the City Council (*supra,* pp. 6-7), speakers were "grouped in categories" by the amount of time requested. The list of speakers was pre-

pared by the City Secretary. Names were called generally in the order they appeared on such list (Dxs. 7, 8, 9, and 10). A copy of the list was on a table outside the entrance to the Council Chamber and available for inspection by all persons. Another copy was in the nearby office of the City Secretary and, as a public record and by policy of that office, was readily available for examination by any interested person before and throughout the hearing. Further, Mrs. Otto, herself, testified that she saw the list; that opposite each name appearing thereon was a number; and that such names were called to speak in numerical order (SF 681-82, 686).

The evidence firmly establishes that the City Council procedures governing the time, place, and manner of such hearing were fair and reasonable and that the hearing was conducted in a "content-neutral" fashion. See *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Consolidated Edison Co. of New York v. Public Service Commission of New York,* 447 U.S. 530, 534 (1980). This is clearly reflected by the opinion of the First Court of Appeals (Pet. App., p. 1). After reviewing all of the evidence in this case, that court specifically held that an "orderly and reasonable procedure was followed in calling on the speakers, and there is no evidence that the city stifled the opposition to its proposed action." The court further found that "there is no evidence that Mrs. Otto was denied the opportunity to be heard."

3. The Question Presented is insubstantial; and the judgment of the First Court of Appeals was based on independent and adequate state grounds.

From what has gone before, it is readily apparent that the Question Presented, even if it were properly before

this Court, does not raise a substantial federal issue. Under the circumstances of this case, such question is not only academic and episodic, it is so devoid of merit that it is frivolous.

The hearing in issue was a requirement of the Texas legislature, not of the federal constitution. Absent such legislative requirement, Houston could have consummated the subject annexation without notice or hearing. The only person possibly impacted by the Qustion Presented is Mrs. Otto. She was not denied the opportunity to be heard; had she been, the opinion below would likely have been different. She was not denied a First Amendment right; had she been she could have sought injunctive relief or damages against Houston under 42 U.S.C.A. § 1983 (West 1981). However, certainly under the circumstances of this case, such denial, even if it had occurred, would not and could not invalidate the ordinance (No. 77-1668) by which the territory proposed to be brought into the City at such hearing was ultimately annexed to Houston. As reflected by the opinion of the First Court of Appeals, such annexation fully complied with all requirements of state law.

This Court has long held that the "number, nature, and duration of powers" conferred on municipal corporations and the territory over which such powers shall be exercised "rests in the absolute discretion of the state"; and that questions relating to the "policy, wisdom, justice, or fairness" of legislative enactments relating to municipal annexations are "not subject to review or criticism by this court." *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907). See *State ex rel. Pan American Production Co. v. Texas City, Texas,* 303 S.W.2d 780 (1957), appeal dismissed, 355 U.S. 603 (1958).

Neither the Question Presented nor any other constitutional issue was raised or decided below. In the absence of an affirmative showing by petitioners that a federal question was presented to the state appellate courts and that a decision on such question was necessary to a determination of this cause, the petition must be denied, especially when, as here, the judgment below was based on adequate state grounds. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM A. OLSON
OLSON & OLSON
MCorp Plaza, Suite 3485
333 Clay Street
Houston, Texas 77002
(713) 759-0696
Texas State Bar No. 15277000

Counsel of Record for Respondents